Supreme Court, U.S.
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No. 08-1014

In The

Supreme Court of the United States

CORNERSTONE AMERICA,
MID-WEST NATIONAL LIFE INSURANCE
COMPANY OF TENNESSEE AND UICI,

Petitioners,

v.

JOSEPH HOPKINS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether independent insurance sales agent leaders, who are annually paid hundreds of thousands of dollars in commissions, who pay for and control their own business operations, and who are considered independent contractors for all other purposes, are "employees" entitled to overtime compensation under the Fair Labor Standards Act.

PARTIES TO THE JUDGMENT SOUGHT TO BE REVIEWED

Pursuant to SUP. CT. R. 14(b), Petitioners Cornerstone America, Mid-West National Life Insurance Company of Tennessee, and UICI offer this list of all parties to the judgment sought to be reviewed. Those parties are as follows:

(a) Cornerstone America – *Appellant*

(b) Mid-West National Life Insurance Company of Tennessee – *Appellant*

(c) HealthMarkets, Inc. f/k/a United Insurance Companies, Inc. – *Appellant*

(d) Joseph Hopkins – *Appellee*

(e) Sherrie Blair – *Appellee*

(f) Andrew Bowman – *Appellee*

(g) Chris Fox – *Appellee*

(h) Bob Howell – *Appellee*

(i) Mark Mann – *Appellee*

(j) Norm Campbell – *Appellee*

(k) Mark Croucher – *Appellee*

(l) Jeff Gessner – *Appellee*

(m) Terrence Johanesen – *Appellee*

(n) Donnie Klein – *Appellee*

(o) Scott Roughen – *Appellee*

PARTIES TO THE JUDGMENT SOUGHT TO BE REVIEWED – Continued

(p) David Young – *Appellee*

(q) Steve Woodhead – *Appellee*

CORPORATE DISCLOSURE STATEMENT

Cornerstone America is the marketing and sales division of Mid-West National Life Insurance Company of Tennessee ("Mid-West"), which is an indirect subsidiary of HealthMarkets, Inc. f/k/a United Insurance Companies, Inc. ("UICI"). All three entities are Defendants in the underlying proceeding.

UICI subsequently changed its name to HealthMarkets, Inc. Although not publicly traded, owners of greater than 10% of HealthMarkets, Inc. stock are Blackstone Investor Group, Goldman Sachs Investor Group, and DLJ Investor Group.

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CITATIONS OF OPINIONS

The opinion for the United States Court of Appeals for the Fifth Circuit is reported at *Hopkins v. Cornerstone America*, 545 F.3d 338 (5th Cir. 2008). The opinion of the United States District Court for the Northern District of Texas is reported at *Hopkins v. Cornerstone America*, 512 F. Supp. 2d 672 (N.D. Tex. 2007).

JURISDICTIONAL STATEMENT

Because this Petition seeks review of a court of appeals' judgment, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The United States Court of Appeals for the Fifth Circuit issued its Opinion and Judgment on October 13, 2008. [App. 2][1] Petitioners, Appellants below, timely filed a petition for panel rehearing, which was denied by Order of November 10, 2008. [App. 77]

[1] Citations to the Appendix to this Petition are made as "App. ___." Citations to the Record are made as "Dkt. ___, APP ___" and "Dkt. ___, Resp. App. ___."

STATUTES INVOLVED

29 U.S.C. § 202 – Congressional finding and declaration of policy

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

[App. 78]

29 U.S.C. § 203 – Definitions

* * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

* * *

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

* * *

(g) "Employ" includes to suffer or permit to work.

[App. 79]

29 U.S.C. § 207 – Maximum Hours

[App. 90]

29 U.S.C. § 215 – Prohibited Acts; prima facie evidence

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29 U.S.C. § 216 – Penalties

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STATEMENT OF THE CASE

Plaintiffs, former Cornerstone sales leaders and agents ("Sales Leaders"), joined in separate lawsuits alleging they had been employees of Cornerstone America and were entitled to overtime compensation pursuant to the Fair Labor Standards Act ("FLSA").[2] While at Cornerstone, however, these same Sales Leaders (1) acknowledged in writing they were independent contractors; (2) received compensation only through commission; (3) received 1099s rather than W-2s; (4) were high wage earners – $100,000-$400,000; (5) as independent contractors, rather than employees, deducted large amounts of business expenses to reduce their income tax; and (6) controlled the "when, where, and how" of their business, including setting their own hours.

Cornerstone is the sales and marketing division of Defendant Mid-West. [Dkt. 82, APP 259] Through Cornerstone, Mid-West issues and sells health insurance policies.[3] [*Id.*] Each of the Sales Leaders entered into a written contract to market and sell insurance

[2] The district court had federal question jurisdiction as the suit was initiated under a federal statute.

[3] HealthMarkets, Inc. f/k/a UICI is the indirect parent company of Defendant Mid-West.

products of Mid-West and expressly agreed they were independent contractors free to manage and control their own business. [Dkt. 82, APP 1-14]

Like many companies in the insurance business, Cornerstone uses an independent contractor sales force. [Dkt. 82, APP 276] Its sales force is comprised of sales groups located throughout the United States. At the pinnacle of each is an Area Sales Leader ("ASL"), who in turn oversees a group of Regional Sales Leaders ("RSL"), who in turn guide District Sales Leaders ("DSL"), who lead and mentor independent sales agents.

In the normal course, a prospective sales agent responds to a newspaper advertisement placed by an RSL. [Dkt. 82, APP 18-19] Following a successful interview with the RSL, the sales agent completes an orientation and submits an application. [Dkt. 82, APP 81] If the application is approved, a sales agent contract is signed. [Dkt. 82, APP 2] When signing the sales agent contract, the agent acknowledges that he or she is an independent contractor. [Dkt. 82, APP 4, 19-20] The agent also must obtain a state-mandated insurance license at his or her own expense, by taking training courses and passing an examination. [Dkt. 82, APP 21]

The sales agents are eligible for "elevation" of their status to DSL, RSL, and ASL positions. [Dkt. 82, APP 9] While sales agents are compensated solely by commissions from their own sales, if a sales agent is elevated to a leader position, the agent receives

overwrite commissions based upon the sales of other sales agents they supervise. [Dkt. 82, APP 9, 17]

Once an agent is "elevated," he or she signs a "sales leader supplement" to the sales agent contract. [Dkt. 82, APP 275, 447-49] The supplement reaffirms that the Sales Leader retains the right of control over the manner and means of his or her business activities. [Dkt. 82, APP 449] The underlying sales agent contract remains in place and continues the independent contractor relationship between the Sales Leader and Cornerstone. [*Id.*]

As independent contractors, the Sales Leaders remain free to sell insurance products. [Dkt. 95, Resp. App. 72] In fact, at least one Sales Leader spent "a lot of his time personally producing" rather than relying solely on the overwrite commissions from those below him. [Dkt. 95, Resp. App. 72]

The Sales Leaders are afforded broad discretion to decide when, where, and how to conduct their business. They set their own work hours, without any control by Cornerstone or Mid-West. [Dkt. 82, APP 26, 42-43] Cornerstone does not supervise, nor does it require reporting of, the Sales Leaders' daily activities. The Sales Leaders are only limited by their own initiative and drive as to the amount of work they choose to pursue. [Dkt. 82, APP 26, 269] As one Sales Leader testified, "the nature of my business dictated my time." [Dkt. 82, APP 26]

Sales Leaders are paid solely on a commission basis – with no salary component. These commissions

vary widely depending on the Sales Leader's initiative, skill, and desire to work. [Dkt. 82, APP 32] The nature of the independent contractor arrangement requires that the Sales Leaders make a substantial capital investment in their businesses. The Sales Leaders are responsible for all of their expenses, including all business overhead – *i.e.*, office phone and cell phone, rental of office space, fax machines, transportation, office supplies, and other equipment used in their insurance sales business. [Dkt. 82, APP 22-24] The Sales Leaders file tax returns as sole proprietors and write off business expenses against their incomes to reduce their tax liability. [Dkt. 82, APP 27-28] Many of the Sales Leaders are able to deduct a large percentage of their compensation so that they pay taxes on a substantially reduced income.

The Sales Leaders receive an IRS form 1099 – the form used to reflect non-employee compensation. [Dkt. 82, APP 27] Cornerstone withholds no taxes from the Sales Leaders' compensation, and the Sales Leaders are responsible for all state and federal income tax, self-employment tax, social security tax, and Medicare tax. [*Id.*] They receive no paid vacation, health insurance benefits, or company paid pension or 401(k) benefits. [Dkt. 82, APP 25]

Because the insurance industry is highly regulated on a state-by-state basis, periodic meetings are necessary in order to ensure that Cornerstone maintains compliance with various state insurance regulations. [Dkt. 82, APP 257] As set forth in the sales

agent contract, the Sales Leaders are required to attend these compliance meetings. [Dkt. 82, APP 3] Cornerstone reviews and approves advertising to comply with governmental regulations. Likewise, Cornerstone sets the price of the insurance policies in compliance with state-mandated processes. State laws prohibit subsequent reductions or rebates of premiums.

The district court consolidated the Sales Leaders' lawsuits for discovery and, upon the filing of competing summary judgment motions, addressed whether, under the FLSA, the Sales Leaders were employees or independent contractors. In a written opinion, the district court found, as a matter of law, that the Sales Leaders were employees, thus bringing them under the purview of the FLSA.[4] *Hopkins v. Cornerstone America*, 512 F. Supp. 2d 672 (N.D. Tex. 2007). [App. 23]

The district court later granted Cornerstone's Motion for Interlocutory Appeal and certified one issue. The Fifth Circuit granted Cornerstone's request for interlocutory appeal, but ultimately affirmed the district court's finding that the Sales Leaders, for purposes of the FLSA, were employees.

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[4] The district court found that Plaintiff Chris Fox was judicially estopped from asserting his status as that of an employee of Cornerstone. The Fifth Circuit eventually vacated that finding. *See Hopkins v. Cornerstone America*, 545 F.3d 338, 348 (5th Cir. 2008). [App. 18-19]

Hopkins v. Cornerstone America, 545 F.3d 338, 348 (5th Cir. 2008). [App. 18]

ARGUMENT

THE FIFTH CIRCUIT'S JUDGMENT THAT THE SALES LEADERS WERE CORNERSTONE'S "EMPLOYEES" FAILS TO TAKE INTO ACCOUNT THE PURPOSE BEHIND THE FLSA AND RUNS AFOUL OF THE FACTORS THIS COURT SET FORTH IN *UNITED STATES V. SILK*.

Cornerstone's independent contractor arrangement with the Sales Leaders is outside the purview of the FLSA. Far from being workers who needed protection from substandard wages and long hours, the Sales Leaders were insurance professionals (1) who earned hundreds of thousands of commission dollars, (2) who repeatedly acknowledged their status as independent contractors while they were contracted with Cornerstone, (3) who took full advantage of their independent contractor status by claiming thousands of dollars in tax deductions that they would not have been able to claim as employees, (4) who claimed employee status only after they severed their relationships with Cornerstone, and (5) who exercised complete and exclusive control over their hours and efforts. Accordingly, it makes neither legal nor practical sense to hold that these Sales Leaders were "employees" entitled to the benefits of the FLSA.

In order to pursue a claim under the FLSA, one must prove himself to be an "employee" as opposed to an "independent contractor." *Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185, 1188 (5th Cir. 1979). The FLSA itself provides little guidance to courts attempting to determine a given individual's status. For example, the FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). [App. 79] "Employ" is then defined as including "to suffer or permit to work." *Id.* § 203(g). [App. 82]

Without specific guidance from Congress, courts have concluded that the terms "independent contractor," "employee," and "employer" are "to be determined in light of the purposes of the legislation in which they were used." *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 299 (5th Cir. 1975). This Court has written that, "in the application of social legislation, employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Bartels v. Birmingham*, 332 U.S. 126, 130, 67 S. Ct. 1547, 1550, 91 L. Ed. 1947 (1947); *see also Carrell v. Sunland Constr., Inc.*, 998 F.2d 330, 332 (5th Cir. 1993).

Two main areas of inquiry, therefore, are relevant to a court's consideration of an individual's status under the FLSA. First, a court must consider the purpose for which the FLSA was enacted. Second, a court must determine whether an individual is an "employee" or an "independent contractor" as a matter of "economic reality." In this case, such an analysis

leads to the inescapable conclusion that the Sales Leaders were independent contractors to whom the FLSA does not apply.[5]

A. The FLSA's Scope Does Not Reach Cornerstone's Independent Contractor Arrangement With The Sales Leaders.

The FLSA was enacted to correct abuses by employers that were "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202. [App. 78] As this Court has held, a review of the legislative history of the Act "shows an intent on the part of Congress to protect *certain groups of the population* from substandard wages and excessive hours which endanger the national health and well being and the free flow of goods and interstate commerce." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706, 65 S. Ct. 895, 902, 89 L. Ed. 1296 (1945) (emphasis added). There is no doubt that, in enacting the FLSA, Congress targeted specific workers for protection; as this Court has observed, the purpose of the Act "was to secure for the *lowest paid segment* of the nation's workers a subsistence wage."

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[5] A court's conclusion that an individual is an "employee" under the FLSA is a legal conclusion that this Court reviews *de novo*. *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1441 (10th Cir. 1998); *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043 (5th Cir. 1987) (citing *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1327 (5th Cir. 1985)).

D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 116, 66 S. Ct. 925, 929, 90 L. Ed. 1114 (1946) (emphasis added). Indeed, the FLSA "is directed toward those who themselves are least able in good times to make provisions for their needs when old age and unemployment may cut off their earnings." *Fahs v. Tree-Gold Co-op Growers of Florida*, 166 F.2d 40, 44 (5th Cir. 1948) (citing *Helvering v. Davis*, 301 U.S. 619, 641, 57 S. Ct. 904, 909, 81 L. Ed. 1307 (1937)).

Simply stated, the FLSA was enacted to protect those who cannot protect themselves.[6] As a result, it exempts from coverage those who are in management/leadership positions as well as those who are independent contractors. *See, e.g.*, 29 U.S.C. § 213; *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S. Ct. 1473, 1475-76, 91 L. Ed. 1772 (1947); *Weisel*, 602 F.2d at 1188.

The Sales Leaders in Cornerstone's independent contractor sales arrangement are not individuals the FLSA was designed to protect. Instead, the Sales Leaders were insurance professionals who sold and supervised sales of policies. They were paid by commission only on successful sales. [Dkt. 82, APP 32] As discussed below, these Sales Leaders received hundreds of thousands of dollars in commissions. [Dkt.

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[6] This Court has noted that the "definition of 'employee' in the FLSA evidently derives from the child labor statutes." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326, 112 S. Ct. 1344, 1349-50, 117 L. Ed. 2d 581 (1992).

82, APP 291-344] They wrote off business expenses against their commissions to reduce their income tax liabilities, a practice not available to employees. [*Id.*]

Nonetheless, once the Sales Leaders severed their relationships with Cornerstone, they claimed they were employees – entitled to overtime compensation. However, the Sales Leaders, while at Cornerstone, had complete autonomy over the "when, where, and how" of their efforts. Their time was their own. Since Cornerstone left it to the Sales Leaders to set their hours, no rationale justifies the payment of FLSA-mandated overtime for hours that Cornerstone neither requested nor controlled. Any requirement that Cornerstone pay such overtime under these circumstances is at odds with the FLSA's purpose.

B. Application Of The *Silk* Factors Demonstrates That The Sales Leaders Were Independent Contractors.

To determine whether an individual is an "employee" or an "independent contractor" as a matter of "economic reality," courts apply the five-part test that this Court set out in *United States v. Silk*, 331 U.S. 704, 715, 67 S. Ct. 1463, 1469, 91 L. Ed. 1757 (1947). *See Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043 (5th Cir. 1987). The factors of this "economic reality" test are "(1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the putative employee and employer; (3) the degree to which the 'employee's' opportunity

for profit and loss is determined by the 'employer'; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship." *Id.* (citing *Silk*, 331 U.S. at 715). Here, application of these factors establishes that the Sales Leaders were independent contractors.

1. Cornerstone did not exercise "control" over the Sales Leaders to justify a finding of an employee relationship.

The power to control a worker is a "crucial factor" in determining whether an employment relationship exists. *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984). In fact, it is "generally held that the right to control the manner of doing the work contracted for is the principal consideration in determining whether one is employed as an independent contractor or a servant." *Blankenship v. W. Union Tel. Co.*, 161 F.2d 168, 170 (4th Cir. 1947).

Particularly important for purposes of the FLSA are control over "schedules or conditions of employment," and "the rate and method of payment." *Id.* When a worker retains control over the details of the work to be performed, including the time spent on that work, the control factor points toward independent contractor status. *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998). Here, the Sales Leaders maintained autonomy in the running of their offices – particularly, "when, where, and how" much time they invested in conducting their

business activities. The only control Cornerstone exercised was directed at ensuring compliance with governmental regulations, which is irrelevant in evaluating whether a putative employer has exercised "control" for the purposes of the FLSA.

a. The court of appeals penalized Cornerstone for excessive hours the Sales Leaders worked, when the Sales Leaders alone controlled those hours.

The purpose of the FLSA, as to hours worked, is to impose "overtime penalties to induce shorter working hours." *Mr. W Fireworks*, 814 F.2d at 1043. Therefore, control of the hours worked should be a litmus indicator of FLSA employee status. For instance, in *Herman v. Express Sixty-Minutes Delivery Service* and *Hickey v. Arkla Industries*, the workers set their own hours and schedules and were determined to be independent contractors, outside the purview of the FLSA. 161 F.3d at 303; 699 F.2d 748, 751 (5th Cir. 1983). Specifically, in *Herman*, the Fifth Circuit distinguished between two categories of delivery drivers. One group reported to work at a specified time and was required to "work a set number of hours that [were] determined by [the employer]." *Herman*, 161 F.3d at 303. The other group was free to "set [its] own hours and days of work." *Id.* Not surprisingly, the court held the drivers who were free to set their own hours were independent contractors; but, the drivers who worked set hours were not. *Id.*

Conversely, the employees in *Brock v. Mr. W Fireworks* and *Usery v. Pilgrim Equipment Co.* manned booths according to hours that the defendant companies dictated. 814 F.2d at 1048; 527 F.2d 1308, 1312 (5th Cir. 1976). In *Mr. W Fireworks*, the Fifth Circuit found that "*Mr. W* . . . requires the *operators* . . . to attend the stands twenty-four hours a day." 814 F.2d at 1048 (emphasis in original). Likewise, in *Usery*, the operators followed "standard Pilgrim Laundry hours" "posted on the front door of each pick-up station." 527 F.2d at 1312. This lack of independence to set hours is consistent with employee status. *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1441 (10th Cir. 1998). Accordingly, the workers in *Mr. W Fireworks* and *Usery* were held to be "employees."

Here, the Sales Leaders exercised absolute control over the hours they worked. The Sales Leaders admitted as much, testifying that they (or possibly their customers or spouses) determined the hours they worked – but not Cornerstone. [Dkt. 82, APP 26, 69] One Sales Leader typified the trend: "the nature of my business dictated my time." [Dkt. 82, APP 26]

Even the court of appeals took note of the fact that the "[S]ales [L]eaders possess[ed] a great deal of flexibility with respect to their hours." *Hopkins*, 545 F.3d at 342. [App. 4] The court failed to recognize the significance of this factor, however, choosing instead to penalize Cornerstone for the long hours the Sales Leaders themselves chose to work – an item undisputedly beyond Cornerstone's control. The Opinion of

the court of appeals fails to appreciate this disconnect – or its departure from precedent.

Accountability for long hours worked is justifiable when it is the company that dictated those hours. On the other hand, imposition of legal liability for the excessive hours the Sales Leaders worked at their own discretion smacks of injustice.

b. The "control" the Fifth Circuit held that Cornerstone exercised is instead governmental regulation, which should be irrelevant in an FLSA analysis.

A company's enforcement of governmental regulations does not constitute "control" under an employee/independent contractor analysis. "Consistently the courts have held that regulation imposed by governmental authorities does not evidence control by the employer." *N.L.R.B. v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 922 (11th Cir. 1983).[7] According to

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[7] *See also Weary v. Cochran*, 377 F.3d 522, 526 (6th Cir. 2004) (requirement that agents comply with applicable legal and ethical rules and certain administrative guidelines set out in a company manual was "not the type of control that establishes an employer/employee relationship"); *E.E.O.C. v. N. Knox School Corp.*, 154 F.3d 744, 748 (7th Cir. 1998) (state's extensive regulation of school bus drivers reflected "no 'control'" by the putative employer); *Ware v. U.S.*, 67 F.3d 574, 576 (6th Cir. 1995) (company's payment of agent's local phone service "was necessary in order for AAA to regulate Ware's Yellow Pages advertisement"); *Oestman v. Nat'l Farmers Union Ins. Co.*, 958 F.2d 303, 306 (10th Cir. 1992) ("With regard to the provision in

(Continued on following page)

the Eleventh Circuit, even "employer imposed regulations that incorporate governmental regulations do not evidence an employee/employer relationship *unless pervasive control by the employer exceeds to a significant degree* the scope of the government imposed control." *Id.* (emphasis added).

The insurance business is heavily regulated on a state-by-state basis. [Dkt. 82, APP 257] The alleged "control" the Sales Leaders attempted to prove was nothing more than Cornerstone's attempt to comply with the states' regulation of the insurance industry. As an extension of its own efforts to comply with these governmental regulations – particularly advertising and pricing – Cornerstone attempted to ensure that its Sales Leaders were likewise compliant. Indeed, Cornerstone is responsible for its agents' compliance with these regulations. [Dkt. 82, APP 264]

Regulatory compliance issues aside, "how [the Sales Leaders] run their business and how they sell

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the contracts requiring Appellant to obtain Appellees' written permission before advertising any of Appellees' products, we agree with the district court that this is not the type of control that establishes an employer/employee relationship."); *ARA Leisure Servs., Inc. v. N.L.R.B.*, 782 F.2d 456, 461 (4th Cir. 1986); *Local 777 v. N.L.R.B.*, 603 F.2d 862, 875 (D.C. Cir. 1978) (company exercised "virtually no control [over taxi cab drivers] independent of municipal regulations"); *Sida of Hawaii, Inc. v. N.L.R.B.*, 512 F.2d 354, 359 (9th Cir. 1975) ("the fact that a putative employer incorporates into its regulations controls required by a governmental agency does not establish an employer-employee relationship").

and what they do during their day is totally up to them." [Dkt. 82, APP 264] Cornerstone did not impose control beyond the scope of governmental regulation, particularly not pervasive control that "exceeds to a significant degree the scope of the government imposed control." *Associated Diamond Cabs, Inc.*, 702 F.2d at 922.

Here, both the district court and the Fifth Circuit failed to recognize the significance of the fact that the "control" Cornerstone exercised was merely that required by the states. While the district court noted Cornerstone's argument that the only "control" it exercised was in furtherance of its responsibilities under the law, the district court erroneously rejected this argument, finding that *"the reason for Defendant's control is irrelevant." Hopkins*, 512 F. Supp. 2d at 687 (emphasis added). [App. 54] On appeal, the Fifth Circuit did not analyze this aspect of the "control" issue. [App. 7-8]

The lower courts' opinions, therefore, directly conflict with decisions from the Fourth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits. *See Weary v. Cochran*, 377 F.3d 522, 526 (6th Cir. 2004); *E.E.O.C. v. N. Knox School Corp.*, 154 F.3d 744, 748 (7th Cir. 1998); *Ware v. U.S.*, 67 F.3d 574, 576 (6th Cir. 1995); *Oestman v. Nat'l Farmers Union Ins. Co.*, 958 F.2d 303, 306 (10th Cir. 1992); *ARA Leisure Servs., Inc. v. N.L.R.B.*, 782 F.2d 456, 461 (4th Cir. 1986); *Associated Diamond Cabs, Inc.*, 702 F.2d at 922; *Local 777 v. N.L.R.B.*, 603 F.2d 862, 875 (D.C.

Cir. 1978); *Sida of Hawaii, Inc. v. N.L.R.B.*, 512 F.2d 354, 359 (9th Cir. 1975).

Each of these circuits has disregarded governmental regulation when evaluating the control exercised by a putative employer. Of those, the Sixth and Tenth Circuits specifically considered governmental regulation within the context of the insurance industry. *See Weary*, 377 F.3d at 526 (requirement that agents comply with applicable legal and ethical rules and certain administrative guidelines set out in a company manual was "not the type of control that establishes an employer/employee relationship"); *Ware*, 67 F.3d at 576 (company's payment of agent's local phone service "was necessary in order for AAA to regulate Ware's Yellow Pages advertisement"); *Oestman*, 958 F.2d at 306 ("With regard to the provision in the contracts requiring Appellant to obtain Appellees' written permission before advertising any of Appellees' products, we agree with the district court that this is not the type of control that establishes an employer/employee relationship.").

Unfortunately, the Fifth Circuit did not follow the precedent of other circuits. Instead, it considered the insurance policies as fungible products, much like the fireworks involved in *Mr. W Fireworks*, and ignored the fact that governmental regulation mandated the only "control" Cornerstone exercised.

Unlike the pricing of fireworks, which is not regulated, the pricing of insurance policies is set according to a state-mandated formula. Insurance

agents are statutorily prohibited from changing the price or granting rebates. [Dkt. 82, APP 264, 272] Likewise, the states regulate and oversee insurance advertising. As a result, Cornerstone preapproved the content of advertising to ensure compliance with state regulations. [Dkt. 82, APP 3, 262]

Additionally, unlike fireworks and other fungible things, insurance policies are specialized and tailored to fit each customer because there are many variables involved, such as the customer's age, preexisting conditions, and past medical history. Each Sales Leader was required to pass state mandated exams which, in part, deal with these variables. [Dkt. 82, APP 2] The Sales Leaders also participated in required training to ensure that they complied with government-mandated pricing schemes. [Dkt. 82, APP 271] These types of governmental regulations are not the type of control that establishes employer-employee relationships.

Cornerstone lacked any control over the Sales Leaders' schedules or the hours they worked. In fact, the only "control" Cornerstone arguably exercised over the Sales Leaders was required by governmental regulation. Such "control" is legally irrelevant for the purposes of an FLSA analysis. A proper analysis of this factor, therefore, only supports a conclusion that the Sales Leaders were independent contractors.

2. The Sales Leaders operated their businesses entirely on their own investments.

To determine "the extent of the relative investments of the putative employee and employer," courts compare the investments by the company and the worker in the worker's business or "facilities." *See Halferty v. Pulse Drug Co.*, 821 F.2d 261, 266 (5th Cir. 1987). Significantly, the focus here is on the investments the company and the worker make in *the worker's* business, not the investment the company makes in its business generally. Several key cases illustrate this point.

For example, in *Usery*, the court analyzed whether the operators' investments bore a "direct relationship to the overall cost of operating [their] station[s]," in other words, the *operators'* businesses. 527 F.2d at 1313. The court looked at each party's contribution to the risk capital required to run a laundry pick-up station, finding that Pilgrim "furnishes the station, cash register, fixtures, security devices, counters, racks, hangers, bags, tags, receipts, utilities, telephone, and liability insurance." *Id.* at 1314. Notably, the court did not consider Pilgrim's investment in its own business, *i.e.* dry-cleaning clothing, etc.

Likewise, in *Hickey*, the court compared Hickey's investment in "his business" to that of Arkla. 699 F.2d at 752. The court considered that Hickey paid "operating expenses, automobile expenses, and travel

expenses which had a direct relationship to the overall cost of operating *his business*." *Id.* (emphasis added). Comparatively, "Arkla furnished office space, secretarial services and advertising." *Id.* The court did not discuss the investment Arkla made in its own business.

Similarly, in *Donovan v. DialAmerica Marketing, Inc.*, the court analyzed the FLSA employee status of distributors of information cards to home researchers of telephone numbers for a telephone marketing firm. 757 F.2d 1376 (3d Cir. 1985). The court considered the distributors' investment in transportation and advertising for new home researchers, finding that the investment factor weighed in favor of independent contractor status and ultimately holding that the distributors were independent contractors for purposes of the FLSA. *Id.* at 1386-87.

Finally, in *Mr. W Fireworks*, the court considered only the company's investment in the operators' businesses, *i.e.*, running fireworks retail stands. 814 F.2d at 1052. The court found that "Mr. W assumes the sole cost of providing the stands, the licenses, insurance, land on which the stands are erected, electricity for the stands, . . . routemen to supply the stands, and advertising." *Id.*

Here, the Fifth Circuit noted Cornerstone's argument "that the Sales Leaders made 'substantial investments' in their individual offices." *Hopkins*, 545 F.3d at 344. [App. 9] However, the court failed to give this argument appropriate weight, erroneously focusing on Cornerstone's investment in its insurance business

generally and holding that "Cornerstone's greater overall investment in the business scheme convinces us that the relative investment factor weighs in favor of employee status." *Id.* (noting Cornerstone's investment in "maintaining corporate offices, printing brochures and contracts, providing accounting services, and developing and underwriting insurance products"). [App. 8-9]

Had the Fifth Circuit analyzed this factor properly, it would have found that the relative investment factor weighs heavily in favor of independent contractor status. Because Cornerstone made absolutely *no* investment in the Sales Leaders' businesses, the Sales Leaders were responsible for paying *all* of their own expenses. These expenses included the types of items the courts considered in *Usery*, *Hickey*, *Donovan*, and *Mr. W Fireworks*, such as employee salaries (secretarial and administrative), license testing and renewal fees, continuing education, marketing and advertising, utilities, office telephone and cell phone, fax machines, transportation, office furniture, office supplies, "sales team perks," sales contests, Christmas parties, and necessary equipment. [Dkt. 82, APP 22-24, 36, 49, 70, 85, 100]

As one RSL testified,

A. I paid all expenses.

Q. Everything?

A. Everything.

[Dkt. 82, APP 49]

The amounts the Sales Leaders invested were particularly significant when compared with their gross receipts. As their own tax returns demonstrate, it was not unusual for a Sales Leader's expenses to exceed fifty percent of his or her gross receipts. [Dkt. 82, APP 305, 311, 343] And as the table reflects, in 2004, Sales Leader Mark Croucher's expenses actually exceeded his gross receipts, leaving him with a net loss for the year.

Year	Agent	Income	Expenses	Citation
2000	Terrence Johanesen, Jr.	$182,889	$142,314	Dkt. 82, APP 305
2002	Mark Croucher	168,089	133,649	Dkt. 82, APP 311
2003	Norman Campbell	204,422	141,827	Dkt. 82, APP 343
2003	Terrence Johanesen, Jr.	394,356	217,373	Dkt. 82, APP 317
2004	Norman Campbell	228,762	211,244	Dkt. 82, APP 293
2004	Mark Croucher	142,709	163,511	Dkt. 95, APP 112

Given that the Sales Leaders ran independent businesses into which they invested all of the necessary capital, the district and appeals courts misapplied the relative investment factor. The lower courts should not have compared the Sales Leaders' investments in their own businesses to Cornerstone's investment in its insurance business. Instead, the

courts should have considered whether Cornerstone invested in the *Sales Leaders'* businesses. It did not. Accordingly, the "relative investments" factor strongly supports the conclusion that the Sales Leaders were independent contractors.

3. Cornerstone did not determine the Sales Leaders' opportunities for profit and loss.

In considering the degree to which the employee's opportunity for profit and loss is determined by the employer, a court evaluates the worker's ability to influence the making of a profit or loss. Of particular relevance are the worker's capacity for, and control over, managerial decisions affecting both finances and personnel. *See, e.g., Silk*, 331 U.S. at 712; *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981). A worker's aptitude for management can directly affect his profit and loss, thus favoring independent contractor status. *DialAmerica Mktg.*, 757 F.2d at 1387.

This Court has recognized that "[p]roduction and distribution are different segments of business," and "[t]he distributor who undertakes to market at his own risk the product of another . . . ordinarily cannot be said to have the employer-employee relationship." *Silk*, 331 U.S. at 712. Here, the Sales Leaders marketed and distributed insurance products at their own risk. This, combined with their exercise of managerial skills in building and motivating a sales force,

determined their own opportunities for profit and loss.

As stated above, the Sales Leaders ran and paid for their own offices, including all of the expenses required to run a business. They profited from their ability to manage expenses and recruit salesmen to work under them. Because the Sales Leaders received commissions from the sales of these recruits, the Sales Leaders' profits were not based solely on their own toil. They were entrepreneurs seeking a return on their investments.

A comparison of their tax returns demonstrates conclusively that the Sales Leaders controlled their own opportunities for profit or loss. The amount of money each Sales Leader made varied greatly. Each Sales Leader reported their gross receipts (total income) and their net profit (gross receipts minus business expenses) on a Schedule C on their tax returns. Sales Leaders reported gross receipts ranging from $100,000 to nearly $400,000. [Dkt. 82, APP 389; Dkt. 95, Resp. App. 84] Expenses likewise varied so that some of the Sales Leaders reported healthy profits, while others reported losses. [Dkt. 95, Resp. App. 112] Ultimately, a Sales Leader's ability to control costs severely impacted his or her opportunity for profit.[8]

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[8] The fact that each Sales Leader reported differing expenses evidences the independence they exercised in managing their finances.

Regarding personnel issues, the Fifth Circuit erroneously concluded that "Cornerstone controlled the hiring, firing, and assignment of subordinate agents." *Hopkins*, 545 F.3d at 344. [App. 9] Instead, the evidence reflects that the various Sales Leaders, themselves, were the gatekeepers with respect to Cornerstone's "decisions."

The economic reality was that the RSLs controlled the hiring by soliciting, interviewing, selecting, and recommending sales agents. [Dkt. 82, APP 18-19] By the same token, the ASLs controlled the firing, assignment, distribution of leads, and other relevant decisions that may have affected the Sales Leaders' commissions. [Dkt. 86, 103] In fact, ASLs such as Joseph Hopkins – who would "hand down the punishments when necessary" – could directly affect their own opportunity for profit when they chose to discipline their subordinates (due to their reliance on overwrite commissions). [Dkt. 86, 104]

So, while the Sales Leaders' profits and losses may have been influenced by the actions of others, the evidence demonstrates that those were actions of other independent contractor Sales Leaders – not Cornerstone. Therefore, this factor supports a conclusion that the Sales Leaders were independent contractors.

4. Operation of the Sales Leaders' businesses required skill and initiative.

Work that requires skill and initiative is generally indicative of independent contractor status. Conversely, "[r]outine work which requires industry and efficiency" generally indicates employee status. *Usery*, 527 F.2d at 1314; *see also Dole v. Snell*, 875 F.2d 802, 811 (10th Cir. 1989). Under the FLSA, exercising skill and initiative in areas such as management of other workers, controlling revenues and expenses, and recruiting and motivating subordinates is indicative of independent contractor status. *Dial-America Mktg.*, 757 F.2d at 1387. A worker's exercise of skill and initiative is "far more vital" than his control over items such as price and territory. *Hickey*, 699 F.2d at 752.

Ignoring these authorities, the Fifth Circuit concluded that the skills the Sales Leaders exercised suggested they were employees rather than independent contractors. The record simply does not support such a conclusion. Rather, to run a business as a Sales Leader required a healthy mix of skill and initiative. The Sales Leaders testified that the Sales Leader position required, above all, a "skill set." [Dkt. 95, Resp. App. 60] They further testified that a Sales Leader with more initiative would certainly make more money. [Dkt. 95, Resp. App. 5] The Sales Leaders themselves – who had first-hand experience with what it took to be successful – acknowledged that both skill and initiative were integral parts of their jobs.

The various states heavily regulate the business of selling insurance products and recruiting additional agents to sell insurance products. [Dkt. 82, APP 276] To make a profit while staying within the bounds of governmental regulation required the Sales Leaders to hone and develop their skills and to demonstrate initiative in building their businesses.

The Sales Leaders surely would have failed without initiative. They had to recruit members to the sales force working directly under them, interviewing and evaluating candidates and using their judgment as to whether the interviewee would be a productive addition to the business. [Dkt. 82, APP 262] Indeed, the Sales Leaders built their businesses on initiative, judgment, and foresight, using the tools of advertising, marketing, and sales. Accordingly, this factor supports a conclusion that the Sales Leaders were independent contractors.

5. The lack of permanency in the Sales Leaders' relationships with Cornerstone weighs in favor of independent contractor status.

In assessing permanence, the contractual terms of a worker's relationship with a company outweigh a retrospective look at the actual length of the relationship. *Hickey*, 699 F.2d at 752 ("Hickey, notwithstanding his tenure of ten years, was capable of terminating his relations with Arkla upon 30 days notice and taking his business organization and

talents to other manufacturers of similar or different products."). The fact that an insurance agent has the freedom "to leave . . . at any time and use her skills to work for other insurance companies" is a strong indicator of independent contractor status. *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 379 (7th Cir. 1991) (affirming an independent contractor finding under the economic realities test in a Title VII case).

Additionally, a worker's ability to remain in a particular industry once his or her contract with a company ends supports a conclusion that the worker's relationship with that company was not permanent. *See Mr. W Fireworks*, 814 F.2d at 1054 ("[e]conomic dependence is *not* conditioned on reliance on an alleged employer for one's primary source of income, for the necessities of life." Instead, it "examines whether the workers are dependent on a particular business or organization for their continued employment in that line of business.") That a worker may suffer a substantial loss by terminating his or her relationship with a company does not evidence an employee relationship for purposes of the FLSA. *Hickey*, 699 F.2d at 752. To the contrary, the worker's ability to take his or her skills elsewhere in the insurance industry evidences an independent contractor relationship.

The Sales Leaders did not have a permanent relationship with Cornerstone. Regardless of the fact that many of the Sales Leaders maintained long relationships with Cornerstone [Dkt. 82, APP 16,

166], the contracts the Sales Leaders signed with Cornerstone provided that either party could terminate the contract without cause at any time. [Dkt. 82, APP 8, 258] Additionally, many of the Sales Leaders remained in the insurance business when their contracts with Cornerstone ended. [Dkt. 95, Resp. App. 9] In other words, the Sales Leaders were not dependent on Cornerstone for their continued participation in the insurance industry. This factor supports a conclusion, therefore, that the Sales Leaders were independent contractors.

C. Insurance Agents Are Independent Contractors Under Statutory Schemes.

Cornerstone's contractual arrangement with the Sales Leaders was nothing out of the ordinary for the industry. In fact, it was the norm. [Dkt. 82, APP 276] And while this is a case of first impression under the FLSA, courts have analyzed the nature of insurance agents' working relationships under various federal statutes – universally finding that insurance agents are independent contractors. It is proper for the Court to consider these other decisions in evaluating the Sales Leaders under the FLSA, in part to harmonize the law. For example, in *Herman*, the Fifth Circuit

looked to decisions regarding employment status made under other legislation that involved the type of worker at issue (delivery driver). 161 F.3d at 305. Due to the existing precedent, the court wrote that "[c]omparatively, it is easier to conclude independent contractor status for the drivers in the case at bar." *Id.* at 306.

Many courts, in numerous contexts, have held that insurance agents are independent contractors. Among them are *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992) (ERISA, applying a common law test); *Knight*, 950 F.2d at 377 (Title VII, employing a five-factor "economic realities" test); *Oestman*, 958 F.2d at 303 (ADEA, employing a "hybrid" test of both "economic realities" test and the common law test). While courts may attach different labels to the tests applied under Acts such as ERISA, Title VII, and the ADEA, the factors and considerations analyzed under each test are largely duplicative. In fact, in at least one Fifth Circuit ADEA case decided before a definitive test had been developed, the Court applied the FLSA "economic realities" test. *See Hickey*, 699 F.2d at 751. These other decisions should therefore be considered by the Court, if only to ensure consistency where there is overlap.[9]

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[9] *See also Wortham v. Am. Family Ins. Group*, 385 F.3d 1139 (8th Cir. 2004); *Weary*, 377 F.3d at 522; *Schwieger v. Farm Bureau Ins. Co. of NE*, 207 F.3d 480 (8th Cir. 2000); *Barnhart v. New York Life Ins. Co.*, 141 F.3d 1310 (9th Cir. 1998); *Birchem v.*

(Continued on following page)

With respect to social legislation such as the FLSA, this Court has explained:

> There is no indication that Congress intended to change normal business relationships with which one business organization obtained the services of another to perform a portion of production or distribution. Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors.

Silk, 331 U.S. at 714. Congress did not intend to modify the relationships between companies and workers when it passed the FLSA. It follows that Congress did not intend to amend the business practices of companies such as Cornerstone, which carefully subscribes to an independent contractor system with respect to its sales force.

The effect of determining the Sales Leaders to be employees under the FLSA, yet independent

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Knights of Columbus, 116 F.3d 310, 313 (8th Cir. 1997); *Moore v. Am. Family Mut. Ins. Co.*, 936 F.2d 575 (7th Cir. 1991); *Barnes v. Colonial Life and Acc. Ins. Co.*, 818 F. Supp. 978, 980-81 (N.D. Tex. 1993); *Durst v. Illinois Farmers Ins. Co.*, 2006 WL 1519322 (N.D. Ill. 2006); *Lockett v. Allstate Ins. Co.*, 364 F. Supp. 2d 1368 (M.D. Ga. 2005); *Desimone v. Allstate Ins. Co.*, 2000 WL 1811385 (N.D. Cal. Nov. 7, 2000); *U.S.E.E.O.C. v. Catholic Knights Ins. Soc'y*, 915 F. Supp. 25, 29 (N.D. Ill. 1996); *Robinson v. Bankers Life and Cas. Co.*, 899 F. Supp. 848, 849 (D.N.H. 1995); *Dixon v. Burman*, 593 F. Supp. 6, 12 (N.D. Ind. 1983).

contractors for virtually every other purpose, creates an unworkable situation that will ultimately modify the well-settled nature of the insurance industry. According to this Court, such forced modification goes against the grain of the FLSA. But, such a decision would also lead to an inequitable result, whereby the Sales Leaders would be allowed to reap all of the benefits of working as independent contractors, yet put on an employee hat under the FLSA to sue for the benefits of being an employee – benefits they expressly opted not to receive in favor of independent contractor status.

CONCLUSION

Petitioners respectfully request that the Court Grant this Petition for Writ of Certiorari, and after briefing and oral argument, reverse the Fifth Circuit's Judgment and render a judgment dismissing the Fair Labor Standards Act claims.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-10952

JOSEPH HOPKINS; COLLECTIVE ACTION MEMBERS

Plaintiffs-Appellees-Cross-Appellants,

v.

CORNERSTONE AMERICA; MID-WEST NATIONAL LIFE INSURANCE COMPANY OF TENNESSEE; UNITED INSURANCE COMPANIES INC

Defendants-Appellants-Cross-Appellees.

SHERRIE BLAIR; ANDREW BOWMAN; CHRIS FOX; BOB HOWELL; MARK MANN; COLLECTIVE ACTION MEMBERS

Plaintiffs-Appellees-Cross-Appellants,

v.

CORNERSTONE AMERICA; MID-WEST NATIONAL LIFE INSURANCE COMPANY OF TENNESSEE; UNITED INSURANCE COMPANIES INC

Defendants-Appellants-Cross-Appellees.

NORM CAMPBELL; MARK CROUCHER; JEFF GESSNER; TERRENCE JOHANESEN; DONNIE KLEIN; SCOTT ROUGHEN; STEVE WOODHEAD; DAVID YOUNG; COLLECTIVE ACTION MEMBERS

Plaintiffs-Appellees-Cross-Appellants,

v.

CORNERSTONE AMERICA; MID-WEST NATIONAL LIFE INSURANCE COMPANY OF TENNESSEE; UNITED INSURANCE COMPANIES INC

Defendants-Appellants-Cross-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(Filed Oct. 13, 2008)

Before GARZA and ELROD, Circuit Judges, and HICKS,* District Judge.

EMILIO M. GARZA, Circuit Judge:

Fourteen former sales leaders ("Sales Leaders") of defendant Cornerstone America ("Cornerstone") filed suit for unpaid overtime wages under the Fair Labor Standards Act ("FLSA"). The federal district court granted summary judgment in favor of the

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* District Judge of the Western District of Louisiana, sitting by designation.

Sales Leaders on the threshold issue of whether the Sales Leaders were employees or independent contractors under the FLSA. Cornerstone now appeals this ruling. The Sales Leaders cross-appeal, alleging that the district court erred in dismissing the claims of one of their members, Chris Fox ("Fox"), on the grounds of judicial estoppel. For the following reasons, we affirm in part and vacate in part.

I

Cornerstone is the sales and marketing division of defendant Mid-West National Life Insurance Company of Tennessee ("Mid-West"), a corporation that issues and sells health insurance policies. Cornerstone uses a pyramid system of approximately 1,200 sales agents, each of whom agrees to work as an independent contractor on a commission basis. Some of these agents are subsequently promoted to the position of "sales leader," a management-level position in the Cornerstone hierarchy.

By contract, sales leaders agree to remain as independent contractors when they are elevated from the position of sales agent by Cornerstone. However, their opportunity to engage in personal sales diminishes, and they become primarily responsible for recruiting, training, and managing a team of subordinate sales agents. As the leaders progress in their careers, their primary income derives from overwrite commissions on their subordinates' sales. Despite this economic dependency, there is no formal relationship

between the sales leaders and their team members. Each subordinate agent contracts directly with Cornerstone, and Cornerstone alone controls the hiring, firing, assignment, and promotion of the agents in each leader's team. Cornerstone also unilaterally determines the sales leaders' territories, and prevents the sales leaders from selling other insurance products or operating other businesses. Finally, Cornerstone controls the distribution of sales leads – the "lifeblood" of the business model – and prohibits sales leaders from purchasing leads from outside sources.

Despite this fairly rigid structure, sales leaders possess a great deal of flexibility with regard to their hours and day-to-day affairs. They receive no employment benefits, and Cornerstone withholds no wages for tax purposes. According to Cornerstone, corporate oversight is minimal, and the sales leaders' attendance at Cornerstone meetings and training sessions is generally considered optional.

The plaintiff-Sales Leaders in this case are all former sales leaders of Cornerstone – four were district sales leaders, nine were regional sales leaders, and one was an area sales leader. They filed suit against Cornerstone and its parent companies in federal district court, alleging that they were entitled to unpaid overtime wages as employees under the FLSA. Because the FLSA applies to employees but not to independent contractors, the district court initially sought to determine the employment status of the Sales Leaders. After both sides submitted summary judgment motions, the court ruled in favor

of employee status for all of the Sales Leaders (except Chris Fox), allowing them to proceed with their FLSA claims. As to Fox alone, the district court concluded that judicial estoppel barred him from asserting employee status because he had previously claimed to be an independent contractor in an unrelated lawsuit.

After the district court issued its summary judgment order, Cornerstone sought permission to file an interlocutory appeal on the FLSA issue. *See* 28 U.S.C. § 1292(b) (permitting interlocutory appeal of "controlling question[s] of law as to which there is substantial ground for difference of opinion"). The district court granted permission to appeal and certified the following question for our review: "Whether, under the undisputed facts, Plaintiffs are employees of Defendants or independent contractors under the FLSA." After Cornerstone petitioned this Court for permission to appeal on the certified question, the Sales Leaders petitioned for permission to cross-appeal solely on the estoppel ruling against Fox. We granted both petitions.[1]

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[1] There was some debate in the briefing over whether we had jurisdiction to hear the estoppel-issue cross-appeal. When a district court identifies a particular "controlling question of law" from its order for interlocutory review, we have discretion to address *any issue* contained in the original order. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996). Because we granted the Sales Leaders' petition for permission to cross-appeal, which only raised the estoppel issue, we believe it appropriate to exercise our discretionary review on the matter.

II

Cornerstone contends that the district court erred in concluding that the Sales Leaders were employees under the FLSA. We review *de novo* a district court's legal conclusion as to employment status in a grant of summary judgment. *Carreil v. Sunland Constr., Inc.,* 998 F.2d 330, 332 (5th Cir. 1993). Given the limited scope of the certified question, we consider only the undisputed facts.

The definition of employee under the FLSA is particularly broad. *See Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 326 (1992) (noting that the FLSA "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles"). To determine if a worker qualifies as an employee, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself. *Herman v. Express Sixty-Minutes Delivery Serv., Inc.,* 161 F.3d 299, 303 (5th Cir. 1998). To aid us in this inquiry, we consider five non-exhaustive factors: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. *Id.* No single factor is determinative. *Brock v. Mr. W Fireworks, Inc.,* 814 F.2d 1042, 1043-44 (5th Cir.

1987). Rather, each factor is a tool used to gauge the *economic dependence* of the alleged employee, and each must be applied with this ultimate concept in mind. *Id.*

A.

Under our economic-realities approach, "[c]ontrol is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity." *Mr. W Fireworks,* 814 F.2d at 1049. "[T]he lack of supervision over minor regular tasks cannot be bootstrapped into an appearance of real independence." *Id.* Cornerstone contends that the control factor weighs in favor of independent-contractor status because the Sales Leaders possessed independence in their day-to-day affairs and because Cornerstone exerted little control beyond what insurance-industry regulations required.

After a review of the record, we are convinced that Cornerstone controlled the "meaningful" economic aspects of the business. *See Mr. W Fireworks,* 814 F.2d at 1049. First, Cornerstone controlled the hiring, firing, assignment, and promotion of the Sales Leaders' subordinate agents. Because most of the Sales Leaders relied on overwrite commissions as their primary source of income, the Sales Leaders' lack of control over personnel decisions is significant. Second, Cornerstone at least partially controlled the advertising for new recruits by providing the Sales

Leaders with approved ads and monitoring their placement. Third, Cornerstone exclusively determined the type and price of insurance products that the Sales Leaders could sell. As Cornerstone's corporate representative acknowledged, "one of the tenets" of Cornerstone's business was that leaders could not sell competing products if they wanted to "receive leads" and "have their compensation advanced." Fourth, Cornerstone controlled the number of sales leads the Sales Leaders would receive, and prevented the Sales Leaders from purchasing leads from other sources. Finally, Cornerstone determined the geographic territories where the Sales Leaders and their subordinates could operate.

Because Cornerstone controlled the meaningful aspects of the business model such that the Sales Leaders could not plausibly be considered "separate economic entit[ies]," *see Mr. W Fireworks*, 814 F.2d at 1049, we conclude that the control factor weighs in favor of the Sales Leaders' employee status.

B.

In applying the relative-investment factor, we compare each worker's *individual* investment to that of the alleged employer. *See Herman*, 161 F.3d at 304 (declining to aggregate the alleged employees' investments). Here, it is clear that Cornerstone's investment – including maintaining corporate offices, printing brochures and contracts, providing accounting services, and developing and underwriting insurance

products – outweighs the personal investment of any one Sales Leader. Cornerstone does not dispute this, but argues that the Sales Leaders made "substantial investments" in their individual offices. While this may be true, Cornerstone's greater overall investment in the business scheme convinces us that the relative-investment factor weighs in favor of employee status. *See id.*

C.

We next consider whether the worker or the alleged employer controlled the "major determinants of the amount of profit which the [worker] could make." *See Usery v. Pilgrim Equip. Co., Inc.*, 527 F.2d 1308, 1313 (5th Cir. 1976). Cornerstone contends that the Sales Leaders primarily determined their own profit through recruiting new agents, controlling office costs, and motivating subordinates. We disagree.

The major determinants of the Sales Leaders' profit or loss were controlled almost exclusively by Cornerstone. Cornerstone controlled the hiring, firing, and assignment of subordinate agents, and thus effectively regulated overwrite commissions – the Sales Leaders' primary source of income. Cornerstone controlled the distribution of sales leads, and restricted the Sales Leaders from selling competing products. Cornerstone unilaterally defined the Sales Leaders' territories, and Cornerstone could (and did) assign competing sales leaders within these

territories. Finally, Cornerstone prevented the Sales Leaders from owning and operating other businesses.

Our decision in *Hickey v. Arkla Industries, Inc.* provides an instructive comparison. 699 F.2d 748 (5th Cir. 1983) (applying the economic-realities test in an ADEA case). In *Hickey,* we determined that a gas-products salesman was an independent contractor because his profit hinged on his ability to increase customer volume through initiative and skill. *Id.* at 752. We also noted that the salesman could sell competitors' products. *Id.* By contrast, the Sales Leaders are restricted from selling other insurance products, and their customer volume hinges on Cornerstone's distribution of leads and assignment of subordinate salesmen. Thus, the opportunity-for-profit factor weighs in favor of employee status.

D.

We also consider whether the worker exhibits the type of skill and initiative typically indicative of independent-contractor status. *See Pilgrim Equip.,* 527 F.2d at 1314 ("Routine work which requires industry and efficiency is not indicative of independence and nonemployee status."). Generally, we look for some unique skill set, *see Carrell,* 998 F.2d at 333 (noting that "[p]ipe welding, unlike other types of welding, requires specialized skills"), or some ability to exercise significant initiative within the business, *see Hickey,* 699 F.2d at 752 (noting that the plaintiff-salesman controlled "major components" of

the business open to initiative, including advertising, marketing, and the choice of other products to sell). Here, Cornerstone argues that the Sales Leaders required skill and initiative to successfully recruit, train, and motivate a team of sales agents.

Certainly, the Sales Leaders required a general set of skills to effectively manage their offices and teams. However, these are not specialized skills; they are abilities common to *all* effective managers. *See Pilgrim Equip.*, 527 F.2d at 1314 (suggesting that general skills, "such as business sense, salesmanship, personality and efficiency," are not relevant to the employee-status inquiry). Cornerstone's corporate representatives acknowledged that successful sales leaders did not need any specific skill set. Furthermore, the Sales Leaders had little opportunity to exercise initiative within the business. "All major components open to initiative – advertising, pricing, and most importantly the choice of [insurance-policy providers] with which to deal – are controlled by [Cornerstone]." *See Mr. W Fireworks*, 814 F.2d at 1053. Cornerstone also prevented the Sales Leaders from exercising true initiative in personnel issues, as Cornerstone controlled the ultimate hiring and firing and provided the Sales Leaders with company-approved recruitment ads. Accordingly, we conclude that the skill-and-initiative factor weighs strongly in favor of employee status.

E.

Finally, we consider the permanency of the working relationship. *Mr. W Fireworks,* 814 F.2d at 1047. Most of the Sales Leaders worked for Cornerstone for many years. However, Cornerstone notes that the Sales Leaders' contracts provided for at-will termination, and argues that, as a result, this case is controlled by *Hickey.* In *Hickey,* we held that a salesman was an independent contractor to the gas-products manufacturer whose products he sold. 699 F.2d at 751-52. Although the salesmen had actually sold the manufacturer's products for ten years, we reasoned that the salesman was permitted to sell competitors' products and "was capable of terminating relations with [the manufacturer] upon 30 days notice and taking his business organization and talents to other manufacturers." *Id.* Cornerstone contends that *Hickey* requires us to give more weight to contractual language than to the actual length of the working relationship. However, such a rule would be contrary to our general approach to the economic-realities doctrine, *see, e.g., Mr. W Fireworks,* 814 F.2d at 1047 ("[I]t is not what the [parties] *could* have done that counts, but as a matter of economic reality what they actually *do* that is dispositive."), and at odds with our more recent applications of the permanency factor, *see, e.g., id.* at 1053-54 (discussing the actual length of the working relationship). We think *Hickey's* conclusion is best confined to the situation it was addressing – a nonexclusive business relationship between a supplier and a salesperson.

In this case, almost all of the Sales Leaders worked exclusively for Cornerstone for several years. Cornerstone's corporate representative acknowledged that sales leaders generally remained in their positions for "a significant period of time." Furthermore, unlike the salesman in *Hickey,* the Sales Leaders could not easily terminate the relationship and take their "business organization" elsewhere. *See Hickey,* 699 F.2d at 752. The foundation of the Sales Leaders' business organization – their team of subordinate salesmen – belonged exclusively to Cornerstone. As a matter of economic reality, the permanency factor weighs in favor of employee status for the Sales Leaders.

F.

Because our factors are non-exhaustive, Cornerstone contends that certain other factors weigh in favor of independent-contractor status. Specifically, Cornerstone notes that the Sales Leaders contractually agreed to be, and actually believed themselves to be, independent contractors. While this may be accurate, "[s]ubjective beliefs cannot transmogrify objective economic realities. A person's subjective opinion that he is a businessman rather than an employee does not change his status." *Mr. W Fireworks,* 814 F.2d at 1049 (citations and internal quotations omitted). Furthermore, "facile labels . . . are only relevant to the extent that they mirror economic reality." *Id.* at 1044 (internal quotations omitted).

Cornerstone also contends that a finding of employee status will have a profound effect on the insurance industry, in which the use of independent contractors to sell policies is common. This concern is unfounded, as we deal only with the management-level sales leaders in this case, not sales agents generally.

G.

After reviewing the undisputed facts in light of our five factors, we are convinced that the district court correctly determined the Sales Leaders to be employees under the FLSA. As a matter of economic reality, the Sales Leaders were dependent upon Cornerstone to such an extent that they could not plausibly be considered "in business for [themselves]." *See Herman,* 161 F.3d at 303. The Sales Leaders worked exclusively for Cornerstone for significant periods of time and lacked the ability to exercise true initiative within the business model. Cornerstone controlled the geographic territories, the choice of products to sell, and the price of those products. Cornerstone unilaterally determined the number of sales leads the Sales Leaders could receive and effectively prevented the Sales Leaders from selling competing products or operating other businesses. Perhaps most importantly, Cornerstone controlled the foundation of the Sales Leaders' ultimate success – the hiring, firing, assignment, and promotion of the subordinate salespeople on whom the Sales Leaders relied. Given these facts, we conclude that the Sales

Leaders were employees of Cornerstone as a matter of economic reality.

III

The Sales Leaders contend that the district court erred in invoking judicial estoppel to dismiss Fox's claims on summary judgment. While a grant of summary judgment is generally reviewed *de novo,* we review the use of judicial estoppel only for abuse of discretion. *Kane v. Nat. Union Fire. Ins. Co.,* 535 F.3d 380, 384 (5th Cir. 2008). The abuse-of-discretion standard includes review of whether the court was guided by erroneous legal conclusions. *Id.*

Judicial estoppel is an equitable doctrine that "prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." *Hall v. GE Plastic Pac. PTE Ltd.,* 327 F.3d 391, 396 (5th Cir. 2003) (citations omitted). The purpose of the doctrine is to "protect [ ] the essential integrity of the judicial process" by reducing the "risk of inconsistent court determinations." *New Hampshire v. Maine,* 532 U.S. 742, 750-51 (2001) (internal quotations omitted). Generally, we have recognized at least two requirements to invoke the doctrine: (1) the party's position must be clearly inconsistent with its previous one, and (2) the previous court must have accepted the party's earlier position. *Hall,* 327 F.3d at 396; *see also New Hampshire,* 532 U.S. at 750-51 (approving of the

requirements in *Hall* as general factors rather than inflexible or exhaustive prerequisites).

Sales Leader Fox was previously sued for sexual harassment under the Texas Commission on Human Rights Act ("TCHRA"). *See* Tex. Lab. Code Ann. § 21.001 *et seq.* (Vernon 1996). As a defense to that action, Fox asserted in his pleadings and during his deposition that he was an independent contractor and thus outside scope of the TCHRA. The matter eventually settled before trial. In this case, the district court invoked judicial estoppel to prevent Fox from asserting his employee status under the FLSA. The court reasoned that Fox's prior defense in the TCHRA action was clearly inconsistent with his current claim, and that Fox intended for the previous court to accept his defense.

Fox contends that the district court erred in determining that his claim of employee status under the FLSA was "clearly inconsistent" with his earlier claim of independent-contractor status under the TCHRA. We agree.

Despite the semantic inconsistency, it is legally possible to be an employee for purposes of the FLSA and an independent contractor under most other statutes. *See Nationwide Mut.*, 503 U.S. at 326 (noting that the FLSA "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles"). The TCHRA, which was modeled after Title VII of the federal Civil Rights Act, uses a

"hybrid economic realities/common law control test" to determine employee status. *Johnson v. Scott Fetzer Co.*, 124 S.W.3d 257, 263 (Tex. App. – Fort Worth 2003, pet. denied). Because this hybrid test focuses on traditional agency notions of control, it results in a narrower definition of employee than under a true economic-realities test. *See Deal v. State Farm County Mut. Ins. Co. of Texas*, 5 F.3d 117, 118-19 (5th Cir. 1993) (discussing the hybrid test); *Nationwide Mut.*, 503 U.S. at 326. Furthermore, it is clearly possible for Fox to be an employee under the FLSA even if he *actually believes* himself to be an independent contractor. As the court below acknowledged, "[a] person's subjective opinion that he is a businessman rather than an employee does not change his status" for purposes of the FLSA. *Mr. W Fireworks*, 814 F.2d at 1049. In sum, there is no legal inconsistency in claiming to be an employee under the FLSA and an independent contractor under the TCHRA.

While this conclusion may seem paradoxical, we are convinced that it is in line with the purposes of the doctrine. Judicial estoppel is designed to reduce "the risk of inconsistent court determinations." *New Hampshire*, 532 U.S. at 750-51. Because Fox's claim of employee status under the FLSA could not result in a *legally* inconsistent court determination,

we conclude that the district court abused its discretion in applying judicial estoppel.[2]

IV

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment on the employee status of the plaintiffs under the FLSA. We VACATE the district court's grant of summary

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[2] Although our analysis of the clearly-inconsistent requirement disposes of the current appeal, we note that the contours of our judicial-acceptance requirement are vague. In practice, we have required that the prior court *actually accept* the party's earlier position, "either as a preliminary matter or as part of a final disposition." *See, e.g., In re Superior Crewboats, Inc.*, 374 F.3d 330, 335 (5th Cir. 2004) (finding that the bankruptcy court accepted the party's previous position by issuing a "no asset" discharge). The Supreme Court appeared to approve of this actual-acceptance approach in *New Hampshire*, 532 U.S. at 750-51 ("Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity.") (internal citations and quotations omitted). On the other hand, *New Hampshire* did not purport to establish "inflexible prerequisites," *id.* at 751, and we have at times implied a broader approach to our judicial-acceptance requirement, *see Hall*, 327 F.3d at 399. In *Hall*, we noted in dicta that "[o]ur cases suggest that [judicial estoppel] may be applied whenever a party makes an argument with the explicit intent to induce the district court's reliance." *Id.* In the present case, the district court apparently relied on this statement from *Hall* in applying judicial estoppel absent any indication that the prior court had accepted Fox's position. While we need not rule on the validity of this decision here, we note its potential inconsistency with our general approach and with the Supreme Court's analysis in *New Hampshire*, 532 U.S. at 750-51.

judgment on the issue of judicial estoppel against Chris Fox, and REMAND for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-10952

D.C. Docket No. 4:05-CV-334
4:05-CV-333
4:05-CV-332

JOSEPH HOPKINS; COLLECTIVE ACTION MEMBERS

Plaintiffs-Appellees-Cross-Appellants,

v.

CORNERSTONE AMERICA; MID-WEST NATIONAL LIFE INSURANCE COMPANY OF TENNESSEE; UNITED INSURANCE COMPANIES INC

Defendants-Appellants-Cross-Appellees.

SHERRIE BLAIR; ANDREW BOWMAN; CHRIS FOX; BOB HOWELL; MARK MANN; COLLECTIVE ACTION MEMBERS

Plaintiffs-Appellees-Cross-Appellants,

v.

CORNERSTONE AMERICA; MID-WEST NATIONAL LIFE INSURANCE COMPANY OF TENNESSEE; UNITED INSURANCE COMPANIES INC

Defendants-Appellants-Cross-Appellees.

NORM CAMPBELL; MARK CROUCHER; JEFF GESSNER; TERRENCE JOHANESEN; DONNIE KLEIN; SCOTT ROUGHEN; STEVE WOODHEAD; DAVID YOUNG; COLLECTIVE ACTION MEMBERS

Plaintiffs-Appellees-Cross-Appellants,

v.

CORNERSTONE AMERICA; MID-WEST NATIONAL LIFE INSURANCE COMPANY OF TENNESSEE; UNITED INSURANCE COMPANIES INC

Defendants-Appellants-Cross-Appellees.

Appeal from the United States District Court
for the Northern District of Texas, Fort Worth.

Before GARZA and ELROD, Circuit Judges, and HICKS,* District Judge.

JUDGMENT

(Filed Oct. 13, 2008)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part and vacated in part, and the cause is remanded to the District Court

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* District Judge of the Western District of Louisiana, sitting by designation.

for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that appellants pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: NOV 18 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JOSEPH HOPKINS, et al.	§	CIVIL ACTION NO.
	§	4:05-CV-332-Y
VS.	§	Consolidated with
	§	Civil Actions:
CORNERSTONE AMERICA,	§	4:05-CV-333-Y;
et al.	§	4:05-CV-334-Y

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT AND PARTIALLY GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

(Filed Mar. 30, 2007)

Plaintiffs Joseph Hopkins, et al., are former insurance agents of defendants Cornerstone America, et al., who have filed suit for unpaid overtime wages and retaliation under the Fair Labor Standards Act ("FLSA"), breach of contract, and common-law fraud and conversion.[1] The Court has before it Defendants' motion to dismiss or, in the alternative, for summary

[1] In their response to Defendants' motion to dismiss or in the alternative for summary judgment, Plaintiffs have advised the Court that they "no longer intend to seek submission of their common law claims for fraud and conversion." (Pls.' Resp. Defs.' Mot. Dismiss at 1). Accordingly, the Court will dismiss these claims.

judgment (doc. #80), and Plaintiffs' motion for partial summary judgment (doc. #84). Both parties' motions call upon the Court to decide whether, under the FLSA, Plaintiffs were employees of Defendants or independent contractors. After review of the motions, responses, replies, and appendices, the Court concludes that it has subject-matter jurisdiction, that all of the Plaintiffs, with the exception of Chris Fox, were employees of Defendants, and that Defendants' termination of Plaintiffs' employment contract violated public policy.

I. Factual Background

Defendant Cornerstone America ("Cornerstone") is the marketing and sales division of defendant Mid-West National Life Insurance Company of Tennessee ("Mid-West"). Cornerstone exclusively sells insurance products of Mid-West, which is a subsidiary of defendant United Insurance Companies, Incorporated ("United Insurance").

Cornerstone's business model employs a hierarchic-pyramidal system of sales agents and sales managers. At the lowest level are the sales agents whose sole responsibility is selling Mid-West's insurance policies. In ascending order, there are district sales managers, regional sales managers, area sales managers, and national sales managers.[2] Cornerstone

[2] Cornerstone later changed the names from "managers" to "leaders."

possesses the exclusive authority to hire or fire, promote or demote, and assign or reassign any sales agent or manager. Cornerstone also determines the amount of commissions sales agents and managers will receive.

Plaintiffs all started work as sales agents after being required to pay an application fee, obtain an insurance license at their own expense, go through an initial training period, and sign a sales-agent contract. Under the terms of the contract, all Plaintiffs acknowledged that they were "independent contractors" and that nothing in the contract was "intended to create an employer-employee relationship between" Cornerstone, Mid-West, and Plaintiffs. They also agreed "not to assent to or take a position contrary to [their] status as an independent contractor. . . ."

The contract provided Plaintiffs with broad discretion to "decide when, where, and [how]" to sell Mid-West's insurance policies. Plaintiffs were responsible for all of their expenses, including all business overhead, such as transportation, phone and cell phone, rental of office space, fax machines, office supplies, and any other equipment and materials. These costs, however, where shared among the district and regional sales managers and all of the sales agents that fell under them. Plaintiffs were also responsible for state and federal income tax, self-employment tax, social security tax, medicare tax, unemployment tax, and workers' compensation.

Plaintiffs agreed in the contract "not to sell or solicit . . . any insurance products" from any other company. Cornerstone determined the policies for sale, the price of the policies, and the geographical area where each agent could sell the policies.

In exchange, Plaintiffs were paid strictly on a commission basis determined by the number of insurance policies they sold. They understood that they would receive an Internal Revenue Service form 1099 for income-tax purposes. Plaintiffs received no benefits. They did not accrue vacation time or sick leave, there were no retirement plans, and there was no health insurance.

Although Plaintiffs were primarily responsible for all business expenses under the contract, Cornerstone did pay for some of them. Cornerstone paid for the computers in the office and the software needed to sell the insurance policies. Also, depending on the level of production from the office, Cornerstone would pay for some of the advertising costs. And Cornerstone paid for accounting, sales brochures, training materials, the development of insurance products, and the underwriting of their policies.

Plaintiffs also agreed under the contract to attend periodic meetings and training sessions designed to address compliance issues, regulatory matters, and new or existing insurance products. The contract indicated that there might be other

meetings and training sessions, but that attendance was not mandatory.[3]

Sales agents were eligible for promotion to district sales managers ("district managers"). All of the Plaintiffs had reached the level of district manager. In order to accept this position, Plaintiffs were required to sign a supplemental contract to their original agent contract. Plaintiffs acknowledged in their supplemental contract that "all provisions" in their original agent contract "shall remain in full force and effect." Again, Plaintiffs acknowledged that they were still independent contractors and that Cornerstone did not have "the power or right to control the manner or means of the business activities" performed as district managers.

District managers' responsibilities were to recruit and train new sales agents, see that agents under them complied with the agent contract and with Cornerstone's rules, procedures and guidelines, inform Cornerstone of any violations by a sales agent, safe guard leads obtained through Cornerstone's "LEAD Program," and distribute the leads to sales agents under them. District managers were also responsible for ten percent of Cornerstone's costs in obtaining leads through their LEAD Program.[4] And

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[3] The parties dispute whether in fact attendance was mandatory at these other meetings and training sessions.

[4] Under this program, Plaintiffs would receive the names of prospective policy holders and prospective clients from Cornerstone. This was an important program and Cornerstone invested

(Continued on following page)

district managers were required to pay regional sales managers a "management fee" that went to expenses for maintaining the office. Cornerstone provided training to district managers to teach them how to train new sales agents. The parties dispute whether this training was mandatory.

In return, district managers were not only paid commissions for insurance policies they sold, but they also received an "overwrite" commission. These overwrite commissions were commissions based on the production of the sales agents under them.

District managers were eligible for promotion to regional sales manager ("regional managers"). Plaintiffs Mark Croucher, Terrence Johanesen, Jeff Gessner, Scott Roughen, David Young, Norman Campbell, Donald Klein, Bob Howell, Joseph Hopkins, and Steve Woodhead reached the level of regional manager. Similar to district managers, these Plaintiffs were required to sign a supplemental contract that reiterated their status as independent contractors, and affirmed that all of the provisions in their original sales-agent contracts were to remain in full force and effect.

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a significant amount of time and money developing leads for its agents in the field. The cost of the program was shared among the district, regional, and area managers and Cornerstone. The district, regional, and area managers shared fifty percent of the cost and Cornerstone was responsible for the other fifty percent. But Cornerstone had the exclusive authority to decide who, if any, received the leads generated from the program.

Regional managers' responsibilities are to recruit new sales agents, train and motivate sales agents and district managers, and manage the sales agents and district managers under them. Regional managers are responsible for placing advertisements for new agents and maintaining an office where sales agents can be trained and where new recruits can respond to ads and interview for a position. At times, and depending on the level of productivity, Cornerstone would pay for a portion of these costs. And regional managers were responsible for twenty percent of Cornerstone's costs in obtaining leads through their LEAD Program.

Regional managers spend most of their time recruiting and interviewing new agents and managing rather then selling insurance policies. Although regional managers would conduct the interviews, only Cornerstone had the authority to hire the person. The regional manager could only make a recommendation. And all hires contracted directly with Cornerstone – none were the employee of the regional manager. While typically Cornerstone would place a newly recruited sales agent under the regional manager responsible for acquiring the new recruit, that was not always the case, and, at all times, Cornerstone retained the exclusive authority not only to assign or reassign sales agents to other regions, but to reassign district managers as well. Most of the regional managers' income comes from the overwrite commissions based on the productivity of the sales agents and district managers under them.

Regional managers were eligible for promotion to area sales managers ("area managers"). Only one plaintiff, Joseph Hopkins, reached the level of area manager. Still, he was required to sign a supplemental contract that reiterated his status as an independent contractor, and affirmed that all of the provisions in his original sales-agent contract were to remain in full force and effect.

An area manager's primary responsibility was to supervise and motivate the district and regional managers. The area manager primarily manages the lower management, but may also assist with recruiting and training. Area managers do not have a specific office; instead, area managers are required to travel and visit with the various regional managers under them. Area managers bear all of their travel expenses, and are responsible for twenty percent of the costs associated with the LEADS Program.

None of the plaintiffs currently work for Cornerstone. When they filed their instant lawsuit claiming damages under the FLSA, Cornerstone terminated most of their contracts[5] and withheld their commissions. Cornerstone determined that when Plaintiffs filed their suit alleging that they were employees, Plaintiffs breached their agreement "not to take a position contrary to my status as an independent contractor."

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[5] A few of the plaintiffs had already left Cornerstone before the instant suit was filed.

II. Analysis

A. Subject-Matter Jurisdiction

Defendants' motion to dismiss or, in the alternative, for summary judgment calls upon the Court to decide whether it has subject-matter jurisdiction over this case. Defendants argue that the determination of whether Plaintiffs are employees or independent contractors "is critical to the threshold issue of whether this Court has jurisdiction to adjudicate Plaintiffs' FLSA claims." (Defs.' Br. Supp. Mot. Dismiss at 12).

The first question the Court must decide is whether the employee/independent-contractor determination "affects federal-court subject-matter jurisdiction or, instead, delineates a substantive ingredient of a" FLSA claim. *Arbaugh v. Y & H Corporation,* 126 S.Ct. 1235, 1238 (2006). The determination of this question has consequences. If the Court concludes that Plaintiffs' employment status is jurisdictional, a finding that Plaintiffs were independent contractors would not only require the Court to dismiss Plaintiffs' FLSA claims, but it would require the Court to dismiss their state-law claims as well. The Court's pendant jurisdiction over Plaintiffs' state-law claims relies on the Court having original jurisdiction over their FLSA claims. *See* 28 U.S.C. § 1367; *Exxon Mobil Corporation v. Allapattah Services,* 545 U.S. 546, 552-53 (2005). But if the Court were to conclude that Plaintiffs' employment status is not jurisdictional, but rather, is an essential ingredient to the merits of their

FLSA claims, then the Court may exercise jurisdiction over Plaintiffs' state-law claims even if the Court were to find that Plaintiffs were independent contractors and dismiss their FLSA claims. *See Arbaugh,* 126 S.Ct. at 1244.

"Congress has broadly authorized the federal courts to exercise subject-matter jurisdiction over 'all civil actions arising under the Constitution, laws, or treaties of the United States.'" *Id.* at 1239 quoting 28 U.S.C. § 1331. Whether a claim arises under federal law "is governed by the 'well pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Rivet v. Regions Bank,* 522 U.S. 470, 475 (1998) (internal quotations and citations omitted).

> Before deciding that there is no jurisdiction, the District Court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent the party who brings a suit is master to decide what law he will rely upon and . . . does determine whether he will bring a 'suit arising under' the . . . [Constitution or laws] of the United States by his declaration or bill.

Bell v. Hood, 327 U.S. 678, 681 (1946) (internal quotations and citations omitted). A claim invoking federal-question jurisdiction may nevertheless be dismissed for want of subject-matter jurisdiction

"where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.* at 682-83; *see also Steel Company v. Citizens for a Better Environment,* 523 U.S. 83, 89 (1998).

Plaintiffs' case does not fit the exception. Plaintiffs have asserted claims under the FLSA, which is federal law. Their claims are neither insubstantial nor made solely for the purposes of obtaining subject-matter jurisdiction. Therefore, the Court enjoys subject-matter jurisdiction under section 1331's broad grant of jurisdiction.

Despite this broad grant of jurisdiction over all civil actions under the Constitution, laws, and treaties of the United States, the Supreme Court has recognized that Congress has passed statutes that contain their "own jurisdiction-conferring" provisions. *Id.* at 1240, 1245 n.11. "Congress has exercised its prerogative to restrict the subject-matter jurisdiction of federal district courts based on a wide variety of factors. . . ." *Id.* at 1245 n.11. Thus, the Court must decide whether the FLSA contains its own jurisdiction-conferring provision restricting the Court's normal exercise of jurisdiction under section 1331.

Arbaugh involved an action under Title VII of the 1964 Civil Rights Act, which makes it unlawful for an employer to discriminate, among other things, on the

basis of sex. The Act contains its own jurisdiction-conferring provision, which reads:

> Each United States district court . . . shall have jurisdiction of actions brought under this subchapter.

42 U.S.C. § 2000e-5(f)(3). The Supreme Court explained that when Congress enacted the Civil Rights Act, section 1331 contained an amount-in-controversy jurisdictional limitation. *Arbaugh,* 126 S.Ct. at 1239. Title VII's jurisdiction-conferring provision "assured that the amount-in-controversy limitation would not impede . . . access to a federal forum." *Id.*

In the Civil Rights Act, Congress limited the definition of an "employer" to include only those having fifteen or more employees. *See* 42 U.S.C. § 2000e(b). This definition was found in a part of the act that defined thirteen terms used throughout Title VII. This raised the question of "whether the numerical qualification contained in Title VII's definition of 'employer' affects federal-court subject-matter jurisdiction or, instead, delineates a substantive ingredient of a Title VII claim for relief." *Arbaugh,* 126 S. Ct. at 1238.

Arbaugh brought a case against Y & H Corporation for sexual harassment under Title VII and won a jury verdict in the amount of $40,000. After the district court entered a final judgment, the employer challenged the district court's subject-matter jurisdiction for the first time on the grounds that it had fewer than fifteen employees. Recognizing that it was

"unfair and a waste of judicial resources," the district court nonetheless dismissed Arbaugh's case concluding that the fifteen-or-more-employees requirement was jurisdictional. *Id.*

The Supreme Court reversed and held that "the numerical threshold does not circumscribe federal-court subject-matter jurisdiction." *Id.* The High Court recognized the confusion:

> On the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous. Subject-matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief – a merits related determination.

Id. at 1242 (internal quotations and citations omitted). In an attempt to clear up the confusion, the Supreme Court articulated the following "bright-line" rule:

> If the legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. *See Da Silva*, 229 F.3d at 361 ("Whether a disputed matter concerns jurisdiction or the merits (or occasionally both) is sometimes a close question."). But when Congress does not rank a statutory limitation on coverage

> as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. at 1244.

Applying *Arbaugh,* the United States Court of Appeals for the Fifth Circuit held that the Family Medical Leave Act ("FMLA" or "the Act") definition of an "eligible employee" is not a limit on a federal court's subject-matter jurisdiction but rather, "is an essential ingredient of an FMLA claim for relief." *Minard v. ITC Deltacom,* 447 F.3d 352, 353 (5th Cir. 2006). The FMLA entitles eligible employees to take up to twelve weeks of unpaid leave for any of several reasons, including a serious health condition. *See* 29 U.S.C. § 2612(a)(1)(D). Subject to some limited exceptions, an eligible employee is entitled to certain protections when taking leave under the Act. *See* 29 U.S.C. § 2614. The Act contains a specific definition for "eligible employee." *See* 29 U.S.C. § 2611(2).

The enforcement provision of the Act makes any employer liable to any eligible employee for damages caused by violations of the Act. *See* 29 U.S.C. § 2617. This provision also expressly creates a right of action and provides for federal subject-matter jurisdiction over claims for violations of the FMLA.

> An action to recover damages or equitable relief prescribed . . . may be maintained against any employer . . . in any Federal . . . court of competent jurisdiction by any one or more employees . . . similarly situated.

29 U.S.C. § 2617(a)(2).

"In light of the Supreme Court's decision in *Arbaugh,*" the Fifth Circuit concluded that "the definition section of the FMLA, which defines . . . the term 'eligible employee,' is a substantive ingredient of a plaintiff's claim for relief, not a jurisdictional limitation." *Minard,* 447 F.3d at 356. The Court reasoned that the "eligible employee" requirements "appears in the definitions section, separate from the jurisdictional section, and does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* Applying the Supreme Court's bright-line rule, the Fifth Circuit concluded that Congress had chosen not to treat the eligible-employee requirements as jurisdictional. *Id.* at 357. In light of *Arbaugh* and *Minard,* the Court concludes that the employee/independent-contractor determination does not affect the Court's subject-matter jurisdiction, but instead, delineates a "substantive ingredient" of Plaintiffs' FLSA claims.

The FLSA provides employees with certain rights to wages and overtime wages and prohibits any retaliation against an employee who attempts to enforce the rights under the statute. *See* 29 U.S.C. §§ 207(a)(1), 215(a)(1). The FLSA contains a very broad definition of employee in a separate part of the statute called "definitions," which contain about twenty-four other definitions to be applied throughout the statute. *See* 29 U.S.C. § 203. In another separate part of the FLSA is a provision for "penalties" for its violation. *See* 29 U.S.C. § 216. Under section 216(b) – titled: *Damages; right of action;*

attorney's fees and costs; termination of right of action – the statute provides:

> An action to recover . . . may be maintained against any employer . . . in any Federal . . . court of competent jurisdiction by any one or more employees similarly situated.

This language is nearly identical to the language used in the FMLA's enforcement provision. *See* 29 U.S.C. § 2617(a)(2) ("An action to recover damages . . . may be maintained against any employer . . . in any Federal . . . court of competent jurisdiction by any one or more employees . . . similarly situated."). And like Title VII in *Arbaugh,* and the FMLA in *Minard,* the FLSA'a definitions section is "separate from the jurisdictional section and does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Minard,* 447 F.3d at 356; *Arbaugh,* 126 S. Ct. at 1245. Therefore, the Court concludes that it is compelled to follow *Arbaugh* and *Minard* and hold that the determination of whether Plaintiffs are employees or independent contractors does not affect federal-court subject-matter jurisdiction but, instead, "delineates a substantive ingredient" of Plaintiffs' FLSA claims for relief. *Arbaugh,* 126 S. Ct. at 1238.

B. Summary Judgment

1. Summary-Judgment Standard

Summary judgment is proper when the record establishes "that there is no genuine issue as to any

material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). An issue is considered "genuine" if "it is real and substantial as opposed to merely formal, pretended, or a sham." *Bazan v. Hidalgo Cty.*, 246 F.3d 481, 489 (5th Cir. 2001). Facts are considered "material" if they "might affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To determine whether there are any genuine issues of material fact, the Court must first consult the applicable substantive law to ascertain what factual issues are material. *Lavespere v. Niagara Mach. & Tool Works,* 910 F.2d 167, 178 (5th Cir. 1990). Next, the Court must review the evidence on those issues, viewing the facts in the light most favorable to the nonmoving party. *Id.; Newell v. Oxford Mgmt. Inc.*, 912 F.2d 793, 795 (5th Cir. 1990).

In making its determination on the motion, the Court must look at the full record including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *See* FED. R. CIV. P. 56(c); *Williams v. Adams,* 836 F.2d 958, 961 (5th Cir. 1988). Rule 56, however, "does not impose on the district court a duty to sift through the record in search of evidence to support" a party's motion for, or opposition to, summary judgment. *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir. 1992). Thus, parties should "identify specific evidence in the record, and . . . articulate" precisely how that evidence supports their claims. *Forsyth v. Barr,* 19 F.3d 1527, 1536 (5th Cir. 1994). Further, the Court's

function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *See Anderson,* 477 U.S. at 249.

To prevail on a motion for summary judgment, a moving party may submit evidence that negates a material element of the respondent's claim or defense or show that there is no evidence to support an essential element of the respondent's claim or defense. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322-24 (1986). To negate a material element of the respondent's claim or defense, a moving party must negate an element that would affect the outcome of the action. *See Anderson,* 477 U.S. at 247. If the moving party alleges that there is no evidence to support an essential element of the respondent's claim or defense, the moving party need not produce evidence showing the absence of a genuine issue of fact on that essential element. Rather, the moving party need only show that the respondent, who bears the burden of proof, has adduced no evidence to support an essential element of his case. *See Celotex,* 477 U.S. at 325; *Teply v. Mobil Oil Corp.,* 859 F.2d 375, 379 (5th Cir. 1988).

When the moving party has carried its summary-judgment burden, the respondent must go beyond the pleadings and produce evidence that sets forth specific facts showing there is a genuine issue for trial. *Celotex Corp.,* 477 U.S. at 324; *see also* FED. R. CIV. P. 56(e). This burden is not satisfied by creating some metaphysical doubt as to the material facts, by

conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence. *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *See Anderson*, 477 U.S. at 249-50.

2. Judicial Estoppel

Prior to filing this suit, plaintiffs Norm Campbell and Chris Fox were sued (separately from one another) in the state courts of Texas and California, respectively. Defendants produced a page from a deposition of Campbell taken by the plaintiff in his case. Apparently, in response to the question: "So you consider Mid-West, then, your company?" Campbell replied: "I am an independent contractor." (Defs.' App. Supp. Mot. Dismiss at 396.) Defendants have not produced any other evidence regarding this lawsuit against Campbell.

According to Campbell, he was "named individually in a lawsuit brought by an insured against Cornerstone." (Pls.' Resp. Mot. Dismiss at 19.) The plaintiff "was a sales agent for another [United Insurance]-owned insurer," and was filing suit alleging that Mid-West had apparently failed to pay some medical bills he claimed were covered under his policy. *Id.*; *see also* (Pls.' App. Resp. Mot. Dismiss at 893-97.) Campbell explains that Defendants had paid for his defense and had "paid to settle the claims." *Id.*

Fox and Defendants were sued in the county court of Bexar County, Texas, for, among other things, sexual harassment in violation of Texas Labor Code § 21.001, *et seq.* (commonly referred to as the "Texas Commission on Humans Rights Act"). In his answer[6] to the plaintiff's allegations of sexual harassment Fox asserted,

> Plaintiff is an improper party and lacks standing to sue Defendant Fox under Texas labor Code § 21.001 *et seq.* Defendant Fox asserts that there is no employer/employee relationship between Plaintiff and Fox pursuant to Texas Labor Code § 21.001 *et seq.* Defendant Fox further asserts there is no employer/employee relationship between Fox and the other co-defendants to invoke liability pursuant to Texas labor Code § 21.001 *et seq.*

(Defs.' App. Supp. Mot. Dismiss at 404.) In response to claims of constructive discharge, negligent retention and supervision, respondeat superior, vice principal, ratification, and joint and several liability, Fox asserted that "Plaintiff was not an employee as defined by Texas Labor Code § 21.001 *et seq.*," that he "was not an employee as defined by Texas Labor Code § 21.001 *et seq.*," and that "Plaintiff was not an employee of Defendant Fox and . . . Fox was not an employee of the other co-defendants." *Id.* at 404-08.

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[6] Fox's filed his own separate answer from the co-defendants.

And in his answer, Fox asserted that "all of the individuals identified in Plaintiff's Original Petition were independent contractors and not employees, co-workers, or supervisors of Defendant Fox." *Id.*

Defendants produced certain pages of the plaintiff's deposition of Fox. In the deposition, Fox answers, "I'm a[n] . . . independent contractor with them" in response to the question: "What's your relationship with Cornerstone America?" *Id.* at 399. Fox also stated, "I'm in complete control of my own business. I don't have to answer to anybody, and there's no greater feeling than that." *Id.* at 398a.

According to Fox, his statement that he is in complete control of his business was in response to an inquiry made by the plaintiff's counsel as to "what he would tell potential sales agents he was trying to recruit or train to motivate them. . . ." (Pls.' Resp. Mot. Dismiss at 12.) Fox explains:

> This is not testimony . . . that he was in complete control over his own work as a manager for Cornerstone, and there is significant evidence in this case, including declarations of numerous managers, to establish that a district sales manager was not in control of how own business and did have to answer to supervising managers on a regular basis.

Id. But according to his deposition, Fox was speaking as a district manager: "As a district, yeah." (Defs.' App. Mot. Dismiss at 398a.) He offers no explanation

regarding the lawsuit or the position he took in his answer to the various claims against him.

The Supreme Court has recognized the uniform application of judicial estoppel as "an equitable doctrine invoked by a court at its discretion." *Maine v. New Hampshire*, 532 U.S. 742, 749 (2001) (internal quotations and citations omitted). In its most basic form, the doctrine "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *Id.*

The High Court observed three factors that may inform a court's decision on whether to invoke the doctrine:

> First, a party's later position must be "clearly inconsistent" with its earlier position. . . . Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled." . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. 750-51. But the Court stressed that these factors "do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel." *Id.* at 751. Courts are free to

consider additional or different factors that "may inform the doctrine's application in specific factual contexts." *Id.* The Court emphasized that its decision to use the above-listed factors in the *New Hampshire* case was because

> we simply observe that the [enumerated] factors above firmly tip the balance of equities in favor of barring New Hampshire's present complaint.

Id. In other words, the Supreme Court availed itself of the factors that best fit the circumstances of the *New Hampshire* case.

The Fifth Circuit has recognized judicial estoppel as "'a common-law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position.'" *In the Matter of: Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)). The doctrine is designed "to protect the integrity of the judicial process" by prohibiting parties from deliberately changing positions according to the exigencies of the moment. *Id.* "Because the doctrine is intended to protect the judicial system, *rather than the litigants,* detrimental reliance by the opponent of the party against whom the doctrine is applied is not necessary." *Id.* (emphasis in original).

Generally, two requirements must be met before judicial estoppel can be invoked. "First, it must be shown that the position of the party to be estopped is

clearly inconsistent with its previous one; and [second,] that party must have convinced the court to accept that previous position." *Hall v. GE Plastic Pacific PTE PTD., et al.*, 327 F.3d 391, 396 (5th Cir. 2003) (internal quotations and citations omitted). The doctrine applies to more than just sworn statements made by a party in a previous litigation. *Id.* A party "who has assumed one position in his pleadings may be estopped from assuming an inconsistent position" in subsequent pleadings. *Brandon,* 858 F.2d at 268.

The purpose of the prior-acceptance requirement is to minimize the danger of contradicting a court's determination made in reliance on a party's prior position. *Id.* at 398.

> The previous court's acceptance of a party's argument could be either as a preliminary matter or as part of a final disposition. . . . **The judicial acceptance requirement does not mean that the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits**. . . . Our cases suggest that doctrine may be applied whenever a party makes an argument with the explicit intent to induce the district court's reliance. (Emphasis added.)

Id. (internal quotations and citations omitted).

Turning to Fox, the Court concludes that he should be judicially estopped from asserting his status as that of an employee of Defendants. In a previous litigation involving claims of sexual harassment

under Texas Labor Code § 21.001, Fox asserted in his answer that he was an independent contractor, that he and the plaintiff in that case did not enjoy an employee-employer relationship and that he and Defendants did not enjoy an employee-employer relationship. Under oath, Fox testified that he was an independent contractor and emphasized that, when he recruited potential agents for Defendants, he would pitch to them the benefits of being an independent contractor. That position is clearly inconsistent with the position he is currently taking in this litigation. Now Fox is asserting that he was an employee of Defendants and that they did have an employee-employer relationship. And he is trying to distance himself from his testimony by claiming that he was speaking in the context of a sales agent and not a district manager. But both his answer to the state court and his deposition clearly show otherwise.

It is clear that Fox intended to induce the state court's reliance on his argument that he was an independent contractor and that none of the parties enjoyed any kind of employee-employer relationship. The law is clear in Texas, an "individual must be an employee to receive" the protections of the TCHRA. *Thompson v. City of Austin*, 979 S.W.2d 676, 681 n.5 (Tex.App. – Austin [3rd Dist.] 1998). Fox's intent was to induce the state court to accept his argument as a complete defense to most of the plaintiff's claims. The Court will not allow Fox to shield himself from liability by swearing to one court that he was an independent contractor and then, before this Court, inflict

liability on another by insisting that he is not an independent contractor after all, but is, instead, a sword-wielding employee. This is especially to be prevented given that here Fox is taking his sword after his fellow shield-bearers in the previous case – his independent-contractor co-defendants. This is nothing more than Fox's "'playing fast and loose with the courts to suit the exigencies of [his] self-interest.'" *Coastal Plains,* 179 F.3d at 205 (quoting *Brandon,* 858 F.2d at 268). This is precisely the situation the judicial-estoppel doctrine was designed to prevent.

As to Campbell, the Court concludes that judicial estoppel is not appropriate. While Campbell did testify under oath that he was an independent contractor, Defendants have failed to produce any evidence that Campbell asserted that position as a defense to any claims lodged against him in the California state court. Due to this insufficient evidence, it is not clear to the Court whether his assertion that he is an independent contractor was pivotal to his defense or insignificant. And it is not clear to the Court whether Campbell intended to induce reliance on the part of the California state court. Without more, the Court cannot conclude that Campbell was attempting to play fast and loose with the courts to suit his self-interest. *Id.* Although Campbell is asserting a contradictory position to the one he took under oath, that bears on his credibility, should it be an issue, rather than triggering a judicial estoppel.

Finally, Defendants bring the Court's attention to numerous income-tax returns filed by Plaintiffs where they indicated, under penalty of perjury, that they were self-employed. But the evidence also shows that Defendants gave all of the Plaintiffs IRS form 1099s for income-tax purposes. This is far too coercive to allow an inference by this Court of an estopping inconsistency on Plaintiffs' part. It's all too likely that Plaintiffs felt compelled to state to the IRS that they were self-employed because they received 1099 forms instead of W-2s. Also, though Defendants produce numerous applications where Plaintiffs either indicated they were self-employed or inserted the names of their own businesses, there is also evidence that Plaintiffs initially indicated that they were employees but that Defendants changed the applications and that, on subsequent applications, Plaintiffs merely acquiesced.

Judicial estoppel is aimed at protecting the integrity of the courts and preventing the perversion of the judicial process to serve self-interest. It is not a doctrine designed to protect the interests of government agencies and private business. For that, they can avail themselves of other equitable doctrines, such as promissory and equitable estoppel. And, like Campbell above, Plaintiffs' inconsistent statements are more relevant to their credibility, than to judicial estoppel. Thus, the Court declines to judicially estop the other Plaintiffs.

3. Whether Plaintiffs are Independent Contractors or Employees

Under the FLSA, an employee is defined as "any individual employed by an employer." 29 U.S.C. § 203(e)(1).[7] The statute defines "employer" as "including any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ." 29 U.S.C. § 203(d). And to "employ," as defined by the statute, "includes to suffer or permit to work." 29 U.S.C. § 203(g).

The employer-employee relationship under the FLSA is broadly defined. *See Rutherford Food Corporation v. McComb,* 331 U.S. 722, 728-29 (1947). In fact, the Supreme Court has recognized that the statute's definition of "employee" has "been given the broadest definition that has ever been included in any one act." *United States v. Rosenwasser,* 323 U.S. 360, 363 n.3 (1945); *see also Nationwide Mutual Insurance v. Darden,* 503 U.S. 318, 326 (1992) (noting the "striking breadth" of the expansive definition of employee under the FLSA).

The determination of employment status under the FLSA is guided by the economic reality of the relationship. *Herman v. Express Sixty-Minutes Delivery Services, Inc.,* 161 F.3d 299, 303 (5th Cir. 1998). The Court's focus is on whether, as a matter of

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[7] The statute delineates certain exceptions to this broad definition, none of which apply to this case. *See* 29 U.S.C. § 203(e)(2), (3), (4).

economic reality, a person is economically dependent upon the employer to which he renders his services. *Id.* "In other words, [the Court's] task is to determine whether the individual is, as a matter of economic reality, in business for himself or herself." *Id.*

The Court generally considers five factors in making this determination: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and alleged employer; (3) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and, (5) the permanency of the relationship. *Id.* But the Court has also inquired into whether the alleged employer has the power to hire and fire employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records. *Thrash v. Graves,* 909 F.2d 1549, 1553 (5th Cir. 1990).

"No single factor is determinative." *Herman,* 161 F.3d at 303. Further,

> these factors are not exhaustive, nor can they be applied mechanically to arrive at a final determination of employee status. Rather, they must always be aimed at an assessment of the economic dependence of the putative employees, the touchstone for this totality of circumstances test.

Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1043 (5th Cir. 1987). Facile labels and subjective factors are not controlling, and they are only relevant to the extent that they mirror the economic reality of the relationship. *Id.* at 1044. The dominant factor that informs the Court's decision is economic dependence. *Id.*

> The five tests are aids – tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected. It is *dependence* that indicates employee status. Each test must be applied with that ultimate notion in mind. More importantly, the final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of the FLSA or are sufficiently independent to lie outside its ambit. (Emphasis in original.)

Id.

Findings as to the factors "are plainly and simply" questions of fact. *Id.* The "ultimate conclusion" as to "employee status . . . is a legal conclusion based on factual inferences drawn from historical facts." *Id.* at 1045.

a. Degree of Control

Defendants argue that Plaintiffs[8] were independent contractors because they "controlled their own work, including when, where, and the manner and means under which they conducted business activities." (Defs.' Resp. Mot. Part. Summ. J. at 9-10.) For support, Defendants point to the contracts and supplemental contracts Plaintiffs signed that expressly provided for Plaintiffs' complete control over when, where, and how to conduct their business activities. *Id.* at 10. Defendants contend that Plaintiffs' work went largely unsupervised, that Plaintiffs were given wide latitude in how they accomplished their jobs, and that Plaintiffs supplied the tools and equipment necessary to do their jobs. But in the end, Defendants' chief argument is that Plaintiffs set their own work schedules. (Defs.' Mem. Supp. Mot. Dismiss at 19-20; Defs.' Resp. Mot. Part. Summ. J. at 15-16.)

While Plaintiffs may have had some flexibility in the hours, days, and places they worked, the economic reality is that Defendants controlled the significant aspects of the business. As pointed out above, the critical focus is whether Plaintiffs were independently in business for themselves, and the degree of control must be viewed through that lens. Although Plaintiffs' control over their work schedule is a factor

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[8] Because the Court has determined that plaintiff Fox is judicially estopped from asserting his status as an employee, for purposes of this section, the Court's use of "Plaintiffs" excludes Fox.

the Court can consider, it is by no means a controlling factor. This is especially true today since many employees' work is unsupervised; and many employees work flexible hours or even work from home.

Defendants do not dispute that they controlled what insurance policies Plaintiffs were allowed to sell. It was Defendants who decided what policies they would offer and underwrite. Plaintiffs were prohibited from selling any policies from another company, regardless of whether or not it was a competing policy. And Defendants do not dispute that they controlled the price of the insurance policies.

Further, Defendants do not deny that they controlled the substantive content of any advertising. Before Plaintiffs could place any advertisement, whether print media or otherwise, Plaintiffs had to submit the advertisement to Defendants for approval. Defendants explain that they "imposed this requirement in the contract . . . in order to make sure that insurance advertisements complied with state laws and regulations." (Defs.' Mem. Mot. Dismiss at 20.) But the reason for Defendants' control is irrelevant. What is relevant is the degree of control Defendants exerted over Plaintiffs and whether that control made Plaintiffs dependent on Defendants or whether Plaintiffs were, as a matter of economic reality, in business for themselves.

Defendants also do not dispute that they controlled the hiring or firing, assignment or reassignment, promotion or demotion, and commission rates

of the insurance sales agents and managers. It is undisputed that Plaintiffs' chief income was derived from overwrite commissions (set by Defendants) they received as a percentage of the total production of the sales agents under them. The more sales agents that were under Plaintiffs and the more productive those agents were, the more money Plaintiffs received in the form of overwrite commissions.

Defendants organized their workforce into a pyramidal structure. At the bottom are the sales agents who earn commissions off of the policies they sell. The next level are the district managers who earn overwrite commissions based on a percentage of the total production of all the sales agents under them. The next level are the regional managers who have district managers under them, each of whom have their own sales agents under them. Regional managers also earn overwrite commissions based on a percentage of the total production of all the sales agents that were under the district managers that were under them. The same is true for the next level, the area managers, and the final level, the national manager. The only source of income is the production of the sales agents.

Although Plaintiffs were responsible for recruiting new agents, interviewing prospective agents, training agents, motivating them to sell Defendants' policies, and maintaining an office for the agents to work out of, at best, Plaintiffs could only offer a recommendation as to whether a person should be hired as an agent or fired. Defendants ultimately

decided whether to hire the person, whether to fire the person, and although normally the new recruit was placed under the manager responsible for the recruit, Defendants ultimately decided the placement of that new recruit. Moreover, Defendants controlled whom to promote and whom to demote and, at any time, Defendants could reassign sales agents and managers to other regions or areas. Plaintiffs had no control as to whom was promoted under them and Plaintiffs had no control as to whom was assigned under them.

Another critical aspect of the business was Defendants' LEAD Program. Defendants invested a considerable amount of time and money in developing leads for its agents to sell Defendants' insurance policies. But Defendants do not deny that they controlled the Program and that they decided who received leads and the amount of leads they received.

Finally, the parties do not dispute that Plaintiffs were required to attend certain meetings and training sessions that addressed Defendants' products and compliance issues. The parties do dispute, however, whether other meetings, such as "turn-in" meetings and other training sessions were mandatory or optional. But even assuming these "other" meetings and training sessions were not mandatory, the Court finds that Defendants still controlled the most significant aspects of Plaintiffs' businesses, making them economically dependent on Defendants.

The critical issue in examining the factor of control is whether Plaintiffs were independently in business for themselves or economically dependent on Defendants for their success. The Court is unable to perceive how any individual logically can be said to be in business for himself when he has no control over what product or service the business offers; no control over the price of that product or service; no control over the advertising of that product or service; and no control over hiring or firing, compensation rate, promotion or demotion, and assignment or reassignment of individuals directly responsible for the business's bottom line. Defendants argue that Plaintiffs were free to hire any employees under them, and are quick to point out that one of the plaintiffs had hired her son to help keep track of her phone messages and appointments. But this is insignificant when viewed through the lens of economic dependence. Plaintiff's son, who helped her with scheduling and messages, did not contribute to the production of the business – the bottom line. The most important assets – the sales agents and managers, whose productivity dictated the income for the business; the policies offered; the price of the policies; and the advertising – were all controlled by Defendants. Plaintiffs were completely dependent on Defendants to supply them with the workforce, to supply them with the policies available for sale, and to approve the advertisements needed to push the policies and recruit new agents. They were also completely dependent on Defendants to set the price of the policies and set their rates of compensation. The fact that Plaintiffs controlled their

work schedules and performed their jobs under little or no supervision simply pales in comparison to the amount of control and direction Defendants exerted over every major aspect of the business. "Control is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity." *Pilgrim*, 527 F.2d at 1312-13. Thus, the Court concludes that the degree-of-control factor weighs heavily in favor of Plaintiffs' being employees.

b. Relative Investment of Plaintiffs and Defendants

Defendants argue that "Plaintiffs' relative investments were significant." (Defs.' Mem. Supp. Mot. Dismiss at 22.) Plaintiffs were required to lease their own office space, purchase their own office equipment (phone, computer, office supplies, facsimile machine, etc.) procure and maintain their own licenses, pay for any assistants they hired such as office aids or secretaries, and pay for any advertising costs.

Plaintiffs counter, "There is no question that the amount of money Defendants invested into their business far outweigh[s] the investments made by any of these individual Plaintiffs." (Pls.' Mem. Resp. Mot. Dismiss at 40.) Plaintiffs point out that Defendants admit they invested significantly into their businesses. Defendants are large companies "with an infrastructure designed to underwrite, administer, and pay claims of the insurance products sold by

Plaintiffs." (Defs.' Mem. Supp. Mot. Dismiss at 22.) In fact, Defendants invest a significant amount into corporate offices, personnel, accounting department, human resources, printing brochures, printing the contracts Plaintiffs and other agents sign, creating and paying for training sessions for agents, and creating and developing the insurance policies available for sale. When compared to Plaintiffs, there is no question that Defendants invest far more into the insurance sales business than any one of the Plaintiffs.

Plaintiffs' "relative investment must be compared with the investment of [Defendants] in order to determine the degree of economic dependence." *Mr. W Fireworks, Inc.*, 814 F.2d at 1052. A comparison of Plaintiffs' investment to that of Defendants establishes that "the overwhelming majority of the [capital risk]" is borne by Defendants. Plaintiffs are economically dependent on Defendants' investments in the business, especially since Plaintiffs have no control over the development of the insurance products available for sale. Thus, the Court concludes that the relative-investment factor also weighs heavily in favor of employee status for Plaintiffs.

c. Opportunity for Profit and Loss

Defendants argue, "It is undisputed that Plaintiffs completely controlled their own opportunities for profit and loss." (Defs.' Mem. Supp. Mot. Dismiss at 22.) Defendants claim this is undisputed because

"Plaintiffs admitted as much by confessing that they could increase profits through hustling harder at recruiting new sales people and creating new sales." *Id.* No doubt that's true, but that was the only way Plaintiffs could affect how much they earned. The remainder of the control resided with Defendants.

As discussed above, Plaintiffs' income came from overwrite commissions based on a percentage of the total productivity of the sales agents under them. While Plaintiffs could obviously work harder to generate more sales and recruit more sales agents, so could an employee who works for a retail clothing store selling suits, or the retail manager who recruits more sales associates. But it was Defendants who controlled the products sold and the price of those products. It was Defendants who determined whether a new recruit would be hired and where sales agents would be placed. It was Defendants who controlled the rate of compensation, the advertising, and the geographical location and reach of each Plaintiff. All have a direct impact on each Plaintiff's ability to capture profits and avoid losses.

Defendants are correct that the harder Plaintiffs "hustled" the more money they made. "For the most part, [Plaintiffs'] only 'expenditures' from which the[y] . . . obtain a return is [on] their own labor. . . . Such returns are more properly classified as wages, not profits." *Mr. W Fireworks, Inc.*, 814 F.2d at 1050-51 (internal quotations and citations omitted). Thus, the Court concludes that Plaintiffs are far more akin "to wage earners toiling for a living, than to

independent entrepreneurs seeking a return on their risky capital investments." *Id.*

d. Skill and Initiative

Defendants argue that "Plaintiffs' success depended entirely on their own skill and initiative in selling insurance products." (Defs. Mem. Supp. Mot. Dismiss at 23.) While Defendants admit that they may have provided training to Plaintiffs to assist them in being successful, they argue that it was Plaintiffs' application of those skills that mattered. Defendants maintain that it was Plaintiffs who, through their own efforts, became "insurance professionals" and obtained the necessary licenses to sell insurance. *Id.* Defendants argue that the fact that Plaintiffs were required to pass an insurance exam and obtain a license "weighs in favor of finding an independent contractor relationship." *Id.*

Plaintiffs counter by downplaying the acumen needed to obtain a license to sell insurance. "[I]t is debatable how skillful one must be to obtain such a license . . . " (Pls.' Mem. Resp. Mot. Dismiss at 41.) And they argue that "there is no special skill involved in management." *Id.*

The amount of "skill" required to obtain an insurance license is irrelevant. Whether Plaintiffs were required to obtain a license is just another factor and, at that, one that is ambivalent. An insurance company can hire insurance agents as employees and still require them to obtain licenses. Most

employee brokers for companies like Morgan Stanley and Merrill Lynch are required to have licenses to trade securities on behalf of the companies' clients. Thus, the fact that Plaintiffs were required to obtain licenses does little to inform the Court as to whether Plaintiffs were independently in business for themselves or were Defendants' employees.

The record establishes that the most important skill is Plaintiffs' ability to sell the business to new recruits and to motivate new recruits to sell numerous policies. This "skill" is no different from any other manager engaged as an employee. Skill and initiative that evidence independence cannot include routine duties or responsibilities normally expected of an employee in the same position. Rather, skill and initiative should demonstrate independent entrepreneurism. "'All major components open to initiative-advertising, pricing, and most importantly the choice of . . . [policies] with which to deal – are controlled by [Defendants].'" *Mr. W Fireworks, Inc.*, 814 F.2d at 1053 (quoting *Usery v. Pilgrim Equipment Company, Inc.*, 527 F.2d 1308, 1314-15 (5th Cir. 1976)). Plaintiffs' skills and initiative in obtaining an insurance license and increasing the productivity of the sales agents below them "'are valuable. But many successful employees need these same abilities and perform similar tasks. The bottom line in this enterprise is the business acumen and investment contributed by . . . [Defendants].'" *Id.* Thus, the Court concludes that the skill-and-initiative factor weighs heavily in favor of employee status for the Plaintiffs.

e. Permanency of the Relationship

Defendants argue that "there is no question that the permanency-of-the-relationship factor weighs in favor of finding independent contractor status" because the employment contract provided that "either party may terminate the contract without cause" at any time. (Defs.' Mem. Supp. Mot. Dismiss at 24.) But it's not what the parties "could have done that counts, but as a matter of economic reality what they actually do that is dispositive." *Mr. W Fireworks, Inc.*, 814 F.2d at 1047.

Here, the majority of the Plaintiffs were managers for Defendants for years. Mark Mann was a manager for seven years, Sherri Lewis for six, Andrew Bowman for four, Donald Klein for two and one-half, and Joseph Hopkins for thirteen. The record shows that no Plaintiff stayed with Defendants for less than one year. And Defendants admit, once a sales agent is promoted to manager, the agent would stay with the business "for a significant period of time." (App. Supp. Pls.' Mot. Partial Summ. J. at 33.)

This long-term relationship with Defendants indicates Plaintiffs' dependence on Defendants. Not one of Plaintiffs is capable of terminating his relationship with Defendants and taking his business to another insurance agency. Plaintiffs have no business to take; they have nothing to transfer but their own labor. It makes sense that agents promoted to management would tend to stay with Defendants for long periods of time. After laboring hard to recruit new

sales agents and establishing a constant flow of overwrite commissions from that hard work, one would be reluctant to just throw that away. Thus, the Court concludes that the permanency factor also weighs heavily in favor of Plaintiffs' employee status. *Cf. Pilgrim*, 527 F.2d at 1314 ("The contract involved here is for a 1 year duration and is routinely renewed. . . . Not a single operator is shown to be capable of terminating relations with Pilgrim and taking her organization to another laundry. The operators have nothing to transfer but their own labor.").

f. Other Factors

Defendants argue that Plaintiffs were paid solely on a commission basis; that their earnings were reported on IRS form 1099s; and that Plaintiffs had signed contracts, filed tax returns, and submitted various applications asserting that they were independent contractors and self employed. None of these factors, however, do anything more than inform the Court as to the subjective belief of the parties as to Plaintiffs' status. None objectively illustrates whether, as a matter of economic reality, Plaintiffs were independently in business for themselves. If the Court were to allow these criteria to determine that Plaintiffs were independent contractors, Defendants would be able to escape the labor laws while at the same time reap the benefits of an employer-employee relationship. "Subjective beliefs cannot transmogrify objective economic realities. A person's subjective

opinion that he is a businessman rather than an employee does not change his status." *Mr. W Fireworks, Inc.*, 814 F.2d at 1049; *see also Pilgrim*, 527 F.2d at 1315 ("We reject both the declaration in the lease agreement that the operators are 'independent contractors' and the uncontradicted testimony that the operators believed they were, in fact, in business for themselves as controlling FLSA employee status. Neither contractual recitations nor subjective intent can mandate the outcome of these cases.").

Further, Defendants argue that most of the Plaintiffs have been able to continue to work as insurance agents for other insurance companies. But the Court does see how that fact shows Plaintiffs were not dependent on Defendants' business for which they rendered their services – especially in light of the fact that they had no business to take with them to their new insurance employer. On the contrary, this factor tends to shows the economic dependence of Plaintiffs.

Many of the plaintiffs were involuntarily terminated for bringing this lawsuit. Plaintiffs did not want to forsake their hard-earned gains by leaving voluntarily. This clearly illustrates their economic dependence on Defendants, who owned the fruits of their labor. Plaintiffs were not capable of doing business elsewhere; instead, they had to find employment elsewhere.

Finally, Defendants argue that none of the Plaintiffs received health benefits, sick time, or vacation

days. Again, this has limited impact on the economic reality of the relationship between Plaintiffs and Defendants. Regardless of Plaintiffs' benefits, they still had no control over the most fundamental aspects of the business. The fact that Plaintiffs agreed to terms of their compensation that excluded any benefits "does not show independence. Rather it shows . . . [the alleged employer] chose to place this added burden on its [employees]." *Mr. W Fireworks, Inc.*, 814 F.2d at 1050.

In deciding whether Plaintiffs are employees under the FLSA, the Fifth Circuit has said

> the ultimate criteria are to be found in the purposes of the Act. . . .
>
> The Act is intended to protect those whose livelihood is dependent upon finding employment in the business of others. It is directed toward those who themselves are least able in good times to make provisions for their needs when old age and unemployment may cut their earnings off . . . to those who, as a matter of economic reality, are dependent upon the business to which they render service.

Id. at 1315 (internal quotations and citations omitted). After weighing all of the factors above and remaining mindful "that economic dependence is not an independent variable with a life of its own – it can only be determined in conjunction with consideration of the economic reality of all the relevant circumstances," the Court concludes that Plaintiffs were

employees of Defendants. All of the relevant circumstances disclose that Plaintiffs did not exercise any meaningful control over the insurance business they allegedly ran. Instead, Defendants retained control over major variables that determined Plaintiffs' ability to make a profit, held them captive to the business, and made them dependent on Defendants for their success.

4. Retaliation

Defendants argue that Plaintiffs' retaliation claim under the FLSA must fail because they are not employees under the statute and thus have no standing to bring a retaliation claim. The Court has already determined that all of the Plaintiffs except Fox are employees. Thus, Defendants' argument must fail as to those Plaintiffs.

But as to Fox, because he is judicially estopped from asserting his status as that of being an employee of Defendants, the Court concludes that his retaliation claim under the FLSA must also fail. Under the FLSA,

> it shall be unlawful for any person . . . to discharge or in any other manner discriminate **against any employee** because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter. . . . (Emphasis added.)

29 U.S.C. § 215(a)(3). By the express terms of the statute it applies to any person who retaliates against any employee who seeks to enforce the protections under the FLSA. While the perpetrator of the retaliation can be any person and is not limited to just an employer, the victim of the retaliation must be an employee. Fox has been judicially estopped from asserting his status as an employee of Defendants. Therefore, just like Fox cannot recover under the FLSA for unpaid overtime wages, he cannot recover for retaliation. "Statutory words mean nothing unless they distinguish one situation from another; line-drawing is the business of language." *Contract Courier Services v. Department of Transportation,* 924 F.2d 112, 114 (7th Cir. 1991) (Easterbrook, J.). Under the maxim of statutory interpretation – *expressio unius est exclusio alterius*[9] – when the statute names a certain group as coming under its protection, other unnamed groups are excluded from its reach.

5. Breach of Contract

Defendants argue that Plaintiffs' state-law claim for breach of contract should be dismissed because the Court lacks subject-matter jurisdiction over Plaintiffs' FLSA claims. The Court has already determined that Plaintiffs' status under the FLSA does not affect the Court's subject-matter jurisdiction, and

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[9] Translated: "the expression of one thing is the exclusion of another."

the Court has already determined that all Plaintiffs, with the exception of Fox, were employees of Defendants under the FLSA.

Alternatively, Defendants argue that Plaintiffs' breach-of-contract claim against defendant United Insurance should be dismissed because "Plaintiffs cannot produce evidence establishing a contractual relationship with defendant [United Insurance]." (Defs.' Mem. Supp. Mot. Dismiss at 29.) United Insurance, Defendants claim, "is not an insurance company and has no sales agents." *Id.* Thus, Defendants argue, Plaintiffs "cannot identify a contract with [United Insurance]." *Id.* Plaintiffs have not responded to this argument.

Under Texas law, the essential elements of a breach-of-contract claim are: (1) the existence of a valid contract; (2) the plaintiff performed or tendered performance; (3) the defendant breached the contract; and, (4) the breach damaged the plaintiff. *Frost National Bank v. Burge,* 29 S.W.3d 580, 593 (Tex. App. – Houston [14th Dist.] 2000, no pet.). Subsidiary corporations and parent corporations "are separate and distinct 'persons' as a matter of law and the separate entity of corporations will be observed by the courts even where one company may dominate or control, or even treat another company as a mere department, instrumentality, or agency." *National Plan Administrators, Inc. v. National Health Insurance Company,* 150 S.W.3d 718, 744 (Tex. App. – Austin [3rd Dist.] 2004, pet. granted). "Generally, a court will not disregard the corporate fiction and hold

a corporation liable for the obligations of its subsidiaries except where it appears the corporate entity of the subsidiary is being used as a sham to perpetrate a fraud, to avoid liability, to avoid the effect of a statute, or in other exceptional circumstances." *Lucas v. Texas Industries, Inc.,* 696 S.W.2d 372, 374 (Tex. 1984). In a suit for breach of contract, the plaintiff bears the burden "of justifying recovery against the parent when he willingly contracted with the subsidiary." *Gentry v. Credit Plan Corporation,* 528 S.W.2d 571, 573 (Tex. 1975).

The contract Plaintiffs signed is titled: *Cornerstone America, A Division of Mid-West National Life Insurance Company of Tennessee Agent Contract.* The first paragraph in the contract states,

> This document constitutes a Cornerstone America Agent Contract and becomes effective upon the date accepted, approved, and executed by a duly authorized official of Cornerstone America, a division of Mid-West National Life Insurance Company of Tennessee. . . .

Nowhere in the contract is United Insurance mentioned.

Not only have Plaintiffs wholly failed to respond to Defendants argument regarding United Insurance, they have failed to produce any evidence to justify their recovery against United Insurance for breach of contract when they willingly entered into a contract with Cornerstone America and Mid-West. Thus, the

Court concludes that Plaintiffs' breach-of-contract claim against defendant United Insurance should be dismissed.

Finally, Defendants argue that they had a right to terminate the contract because Plaintiffs breached the contract. Defendants point to a provision in the contract that states, "By executing this Contract, I agree not to assent to or take a position contrary to my status as an Independent Contractor pursuant to this Contract . . . " Defendants argue, "Plaintiffs breached the contract by the initiation of this suit where they expressly take a position contrary to their status as independent contractors." (Defs. Mem. Supp. Mot. Dismiss at 30.)

The FLSA makes it "unlawful for any person . . . to discharge or in any manner discriminate against any employee" because the employee instituted an action under the statute. 29 U.S.C. § 215(a). Defendants freely admit that it was Plaintiffs' initiation of this case asserting claims as employees under the FLSA that was the impetus behind their termination of the contract and their subsequent refusal to pay Plaintiffs any overwrite commissions earned while employed by Defendants. Defendants argue, however, that

> Plaintiffs erroneously assert that the clause in the contract in which they assent not to take a position contrary to their status as an independent contractor is void as a matter of public policy. Parties may contract as they see fit, as long as their agreement does not

> violate the law or public policy. . . . Plaintiffs freely signed the contract . . . , and they cannot articulate why the contract is either illegal or contrary to the public's interest. . . .

(Defs. Mem. Supp. Mot. Dismiss at 30.)

In determining whether a provision in a contract violates public policy, the Court looks to see if the provision has a tendency "to injure the public good." *Ranger Insurance Company v. Ward,* 107 S.W.3d 820, 827 (Tex. App. – Texarkana 2003, pet. denied). Generally, a provision violates public policy "if it is illegal or inconsistent with or contrary to the best interests of the public." *Id.* Public policy can be embodied in the constitution, statutes, and the decisions of courts. *Id.*

The Supreme Court has stated that the principal congressional purpose behind the FLSA

> was to protect all covered workers from substandard wages and oppressive working hours, "labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."

Barrentine et al., v. Arkansas-Best Freight System, Inc., et al., 450 U.S. 728, 739 (1981) (quoting 29 U.S.C. § 202(a)). The Court found that "the FLSA was designed to give specific minimum protections to *individual* workers" and to guarantee that every employee received "a fair days pay for a fair days work." *Id.* (internal quotations and citations omitted) (emphasis in original).

The FLSA gives individual employees the right to enforce the statutory scheme and grants to them broad access to the courts to accomplish this. 29 U.S.C. § 216(b); *see Barrentine,* 450 U.S. at 740. The statute contains no exhaustion requirements, no procedural barriers, and no other forum for enforcement of the rights conferred under the statute. *See Barrentine,* 450 U.S. at 740. Because of the broad right of access to the courts and the important nature of the rights protected by the statute, the Supreme Court has held that the rights conferred by Congress to employees are nonwaivable. *Id.* And accordingly, the Supreme Court has held that

> FLSA rights cannot be abridged by contract or otherwise waived because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate.

Id.

Based on the forgoing, the Court concludes that the contractual provision prohibiting Plaintiffs from taking a position contrary to their status as an independent contractor, *as applied,* violates public policy. While on its face, the contract provision relied on by Defendants does not violate public policy, its *application* in this circumstance does. Defendants' decision to invoke that contractual provision as grounds to terminate the contract was solely in response to Plaintiffs' initiation of this suit to enforce their substantive rights under the FLSA. Defendants' conduct falls squarely within the anti-retaliation provision in

the statute and is precisely the type of conduct Congress sought to prohibit. To enforce that provision under the circumstances of this case would place the contract in a position of precedence over the congressionally enacted FLSA. This is beyond the power of the Court to do.

III. Conclusion

For the reasons stated above, the Court PARTIALLY GRANTS Plaintiffs' motion for partial summary judgment (doc. #84). The Court holds that all of the Plaintiffs, with the exception of Chris Fox, are employees for purposes of their FLSA claims. Defendants' motion to dismiss or in the alternative for summary judgment is PARTIALLY GRANTED AND PARTIALLY DENIED. The Court holds that Fox is judicially estopped from asserting his status as an employee under the FLSA. Consequently, all of Fox's FLSA claims are DISMISSED WITH PREJUDICE.

Further, the Court holds that Plaintiffs have failed to present any evidence that defendant United Insurance was a party to the contract or otherwise should be held liable for the contractual obligations of its subsidiaries. Consequently, Plaintiffs' breach of contract claim against defendant United Insurance is DISMISSED WITH PREJUDICE.

Further, the Court holds that the provision in the parties' contract addressing Plaintiffs' agreement not to take a position contrary to their status as independent contractors violates public policy as applied

under the circumstances of this case. The evidence conclusively establishes that there was a contract and there was performance under the contract (in fact the parties do not dispute this). Because Defendants asseverate that it was Plaintiffs' filing of a compliant under the FLSA that was the impetus behind their termination of the contract, the Court concludes that Defendants breached the contract.

Finally, because Plaintiffs have stated that they are abandoning their claims of fraud and conversion, those claims are hereby DISMISSED WITH PREJUDICE. In all other aspects, Defendants' motion is DENIED.

SIGNED March 30, 2007

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-10952

JOSEPH HOPKINS; COLLECTIVE ACTION MEMBERS

Plaintiffs-Appellees-Cross-Appellants

v.

CORNERSTONE AMERICA; MID-WEST NATIONAL LIFE INSURANCE COMPANY OF TENNESSEE; UNITED INSURANCE COMPANIES INC

Defendants-Appellants-Cross-Appellees

SHERRIE BLAIR; ANDREW BOWMAN; CHRIS FOX; BOB HOWELL; MARK MANN; COLLECTIVE ACTION MEMBERS

Plaintiffs-Appellees-Cross-Appellants

v.

CORNERSTONE AMERICA; MID-WEST NATIONAL LIFE INSURANCE COMPANY OF TENNESSEE; UNITED INSURANCE COMPANIES INC

Defendants-Appellants-Cross-Appellees

NORM CAMPBELL; MARK CROUCHER; JEFF GESSNER; TERRENCE JOHANESEN; DONNIE KLEIN; SCOTT ROUGHEN;

STEVE WOODHEAD; DAVID YOUNG;
COLLECTIVE ACTION MEMBERS

Plaintiffs-Appellees-Cross-Appellants

v.

CORNERSTONE AMERICA; MID-WEST
NATIONAL LIFE INSURANCE COMPANY
OF TENNESSEE; UNITED INSURANCE
COMPANIES INC

Defendants-Appellants-Cross-Appellees

Appeal from the United States District Court
for the Northern District of Texas, Fort Worth

(Filed Nov. 10, 2008)

ON PETITION FOR REHEARING

Before GARZA and ELROD, Circuit Judges, and HICKS, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge

REHG-2

29 U.S.C.A. § 202. Congressional finding and declaration of policy

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

29 U.S.C.A. § 203. Definitions

As used in this chapter –

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means –

(A) any individual employed by the Government of the United States –

(i) as a civilian in the military departments (as defined in section 102 of Title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the [FN1] Government Printing Office;

(B) any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual –

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who –

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u) of this section, such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if –

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

(5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any

employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further*, That

the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to –

(1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and

(2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title.

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to

prohibit the pooling of tips among employees who customarily and regularly receive tips.

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry.

(o) Hours Worked. – In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r)(1) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of

this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(2) For purposes of paragraph (1), the activities performed by any person or persons –

> **(A)** in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or
>
> **(B)** in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if

the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(C) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

(s)(1) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that –

(A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated);

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution,

or school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.

(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a

State, or a political subdivision of a State; or any interstate governmental agency.

(y) "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who –

(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

(2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

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29 U.S.C.A. § 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the

hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966 –

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for

a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed –

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) of this section or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if –

(A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c), (d) Repealed. Pub.L. 93-259, § 19(e), Apr. 8, 1974, 88 Stat. 66

(e) "Regular rate" defined

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include –

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums [FN1] paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the

Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, [FN2] where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if –

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability,

retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are –

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(f) Employment necessitating irregular hours of work

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of

this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection –

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) of this section are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h) Extra compensation creditable toward overtime compensation

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) Employment in hospital or establishment engaged in care of sick, aged or mentally ill

No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) of this section if, pursuant to an agreement or understanding arrived at between the employer and the

employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if –

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to

the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(*l*) Employment in domestic service in one or more households

No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) of this section.

(m) Employment in tobacco industry

For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection, if such employee –

(1) is employed by such employer –

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying,

handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for –

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) Employment by street, suburban or interurban electric railway, or local trolley or motorbus carrier

In the case of an employee of an employer engaged in the business of operating a street, suburban or

interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) of this section applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

(o) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only –

(A) pursuant to –

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than –

> **(A)** the average regular rate received by such employee during the last 3 years of the employee's employment, or
>
> **(B)** the final regular rate received by such employee,

whichever is higher [FN3]

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency –

> **(A)** who has accrued compensatory time off authorized to be provided under paragraph (1), and
>
> **(B)** who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) of this section if –

> **(A)** such employee is paid at a per-page rate which is not less than –
>
> > **(i)** the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,
> >
> > **(ii)** the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or
> >
> > **(iii)** the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and
>
> **(B)** the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection –

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency –

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of

the hours for which the employee is entitled to overtime compensation under this section

(q) Maximum hour exemption for employees receiving remedial education

Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is –

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

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29 U.S.C.A. § 215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person –

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods

in the production of which any employee was employed in violation of section 206 or section 207 of this title, or in violation of any regulation or order of the Secretary issued under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Secretary issued under section 214 of this title;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 212 of this title;

(5) to violate any of the provisions of section 211(c) of this title, or any regulation or order made or continued in effect under the provisions of section 211(d) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a)(1) of this section proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

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29 U.S.C.A. § 216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in

which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid

minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 [29 U.S.C.A. § 251 et seq.] on account of his failure to comply with any provision or provisions of this chapter or such Act (1)

with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e)(1)(A) Any person who violates the provisions of sections 212 or 213(c) of this title, relating to child labor, or any regulation issued pursuant to such sections, shall be subject to a civil penalty not to exceed –

(i) $11,000 for each employee who was the subject of such a violation; or

(ii) $50,000 with regard to each such violation that causes the death or serious injury of any employee under the age of 18 years, which penalty may be doubled where the violation is a repeated or willful violation.

(B) For purposes of subparagraph (A), the term "serious injury" means –

(i) permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) permanent loss or substantial impairment of the function of a bodily member, organ, or

mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(2) Any person who repeatedly or willfully violates section 206 or 207, relating to wages, shall be subject to a civil penalty not to exceed $1,100 for each such violation.

(3) In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be –

(A) deducted from any sums owing by the United States to the person charged;

(B) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(C) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title or a repeated or willful violation of section 215(a)(2) of this title, to be paid to the Secretary.

(4) Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within 15 days after receipt of notice thereof by certified mail the person

charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5, and regulations to be promulgated by the Secretary.

(5) Except for civil penalties collected for violations of section 212 of this title, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provision of section 9a of Title 29. Civil penalties collected for violations of section 212 of this title shall be deposited in the general fund of the Treasury.